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PSYCHOLOGY
APPLIED TO LEGAL EVIDENCE

AND

OTHER CONSTRUCTIONS OF LAW.

BY

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To

JAMES EMILE BRIDGES,

Retired Member of the Indian Civil Service, Burma,

THIS VOLUME IS RESPECTFULLY DEDICATED.

PREFACE.

THIS work does not claim to be an original treatise on either Psychology or Law. The author has merely aimed at applying the conclusions of the former to legal evidence and other doctrines and constructions of legal writers. As psychologists are not agreed on every point, as happens in most sciences, it will no doubt be possible to find conflicting views on psychological subjects quoted in different parts of this book without any comment by the writer. It must, therefore, be explained here that the author did not consider it necessary, for the purposes of a work like the present, to reconcile such contradictions, and that though in most instances he has chosen to follow the view of some one particular writer, it must not on that account be assumed that he was necessarily ignorant of the existence of other theories. Nor again has he felt himself debarred from occasionally quoting alternative doctrines in different passages, in a few instances in which their application appeared advantageous and in which he was not prepared to hold that either conclusion was necessarily wrong.

It is also desired to anticipate a condemnation which he will possibly incur at the hands of some readers. It is not unlikely that it will appear to some that it is unseemly on the part of one whose legal qualifications

are so slight to criticise the writings of accepted authorities like Sir Frederick Pollock, Sir James Stephen, Mr. J. D. Mayne and others, in the free way which the author has done in this volume. A similar resentment may also be felt at the manner in which some of the decisions of the Judges in England and the High Courts in India have been handled.

It appears, however, to the writer that such an attitude on the part of his readers would be founded on a misapprehension. No claim is either tacitly or openly made in this book to excel such writers or judges in knowledge of the theory or practice of law, as the law is at present understood. The work which is now put forward contains rather a plea for the adoption of a different idea of the sphere of law and a different interpretation of legal duties from those which prevail. For any new idea to win acceptance it is necessary to show that there is some fault in the existing system which it seeks to alter, or at least that the recognized theories and doctrines are capable of improvement. But this cannot be done without a resort to criticism, and it is clear that if every view of a legal authority or past decision of a High Court Judge is to be regarded as above challenge, the law must remain immutable for ever. As, however, the circumstances of human life change and knowledge increases, the law, unless it also advances with the times, must rapidly become useless for practical purposes, or if its antiquated notions are attempted to be enforced in its changed surroundings, flagrant injustice will evidently result.

This is what, in the author's opinion, is happening and among other methods of making it clear, the applications of the conclusions of psychology are most striking. It must, therefore, result that the tone of the present work should be critical and its method destructive; but it would be quite unjust to infer from this that the author has wantonly displayed a lack of proper respect for men who have justly attained to eminence in the line which they and others chose to regard as the proper and only legitimate sphere of the law.

The author has not been able to obtain access to the latest edition of every work quoted, but in no instance has he reason to believe that he has cited an opinion abandoned by the writer in a later edition.

G. F. ARNOLD.



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PSYCHOLOGY

APPLIED TO

LEGAL EVIDENCE & OTHER CONSTRUCTIONS OF LAW.

CHAPTER I.

GENERAL INTRODUCTION.

Difficulties in the way of the reception of this book—Hostility of the lawyers to philosophy—Description of two classes of lawyers—Examples of the hostility referred to—The present attitude of the lawyers to progress unique—The need of some reformation in law—Evidence of dissatisfaction with its present administration—Relation of the law to metaphysics and other sciences—Duty of the lawyers to avail themselves of the conclusions of other sciences—Similar revolt in philosophy against the unreality of some systems of thought—The use of fictions in law and assignment of arbitrary meanings to terms—Particular reasons for the application of psychology to law—Quotations from the Evidence Act and legal writers relating to it—Reasons for the neglect of psychology hitherto shewn by the lawyers—Their traditional attitude to anything outside the Statute-book and their ignorance of what psychology teaches—Concluding remarks.

It must be confessed at the outset that it will be surprising if

Difficulties in the way of the reception of this book.

Descriptions of the two classes of lawyers at the present time.

this volume should be welcomed by the legal profession. It treats, it is true, of legal matters, but it does so in what is believed to be a new way, and a way which is not likely to command the sympathy of the legal mind. For our lawyers have always shewn themselves averse to novelty in any shape, and a systematic application of psychology to any branch of the law is sufficiently novel to cause them a shock. Apart, however from this, there is a further prejudice to overcome. If there be one path which lawyers and judges fear to tread it is that of philosophy: if there is one region in which they do not feel themselves safe, one atmosphere which they regard as poison,

it is that of philosophical notions and metaphysical ideas: and psychology, it must be admitted, is but one branch of mental philosophy. Yet such is the irony of the case that, anxious as they are to avoid the discussion of these matters, the subjects with which they deal are perpetually presenting them with problems whose real character is such that they cannot be adequately solved without the aid of philosophy.

What then is their attitude under these circumstances? It seems to us that it varies with the individual writer or judge: if he is of the true dry-as-dust lawyer type he resolutely rules out as impossible the philosophical consideration of what comes before him and strains some legal maxim or precedent to cover the case. Whether wilfully or unconsciously blind to the fact that it has no application, he obstinately pursues the only method which he knows or wishes to know, convinced that salvation lies here alone, and affects to have solved the problem, though in truth he has all along been dealing with fictions and has arrived at the most artificial of results. But this he cannot perceive and therefore will not admit: his reasonings may be based on presumptions which are at variance with both fact and psychological truth, but they are 'legal' and therefore must be right: his conclusions may offend both common sense and the plain man's feeling of natural justice, but they are warranted by his legal precedents and therefore are beyond dispute: his decision may in reality be no decision of the case at all, and may in effect leave the parties exactly where they were at the outset, but nevertheless legal justice has been done and the matter settled if only by the rule of *res judicata*. He is content with this result. To slightly paraphrase what Charles Lamb says of the Scotchman,^(a) it may be said of him, 'He has no falterings of self-suspicion..... The twilight of dubiety never falls on him..... Between the affirmative and the negative there is no borderland with him. You cannot hover with him upon the confines of truth, or is er in

(a) Charles Lamb, "Essays of Elia."

the maze of a probable argument. He always keeps the path. You cannot make excursions with him, for he sets you right. His taste never fluctuates. His legality never abates. He cannot compromise or understand middle actions. There can be but a legal and an illegal. His conversation is as a book..... He stops a metaphor like a suspected person in an enemy's country."

If, however, he has been partially educated in some other school than that of the law and has a brain that is filled with something beside legal mind dust, he perceives that his case must be defended on other principles. He is, therefore, rather inclined to disown his legal brother whom we have described above: he admits that the law is intended to satisfy social needs, and apologises for its methods—thereby tacitly admitting that it fails to do so—on the ground that it is impossible to admit discussion in the law courts of all the considerations which apply to daily life, as that would make law-suits endless and decisions uncertain. He allows that the law does not always aim at what is usually known as truth, but affirms that progress is being made towards placing the law of evidence 'on broad and scientific, and therefore practical foundations' and making 'formal truth' coincide, as far as possible, with 'real truth'.(a) He speaks of the use of 'a free logic' and of applying principles 'broadly', (b) and will here and there insert a sentiment against the too strict exclusion of evidence, as, *e.g.*, "but the principle of exclusion should not be so applied as to exclude matters which may be essential for the ascertainment of truth," (c) or 'assuming then the general principles relative to the construction of the Act, the spirit in which they should be applied and in which the provisions of the Act should be given effect to, must (it has been held) be of a liberal character. It has been said in England, where the traditional theories still possess much strength, that

(a) See Ameer Ali and Woodroffe's 2d Edn. of the Indian Evidence Act, introduction, p. cxx.

(b) *Ibid.*, p. cxxvi.

(c) *Ibid.*, p. 50, note 1.

artificial rules upon matters of evidence are better avoided as much as possible, and that the law now is that, with a few exceptions on the ground of public policy, all which can throw light on the disputed transaction is admissible.”(a) Quotations of the following kind will appear without comment:—“it is the tendency of modern jurisprudence to admit most evidence logically relevant,”(b) and again : “It is the business of courts reasonably so to shape their rules of evidence, as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them.”(c) When questions that are really metaphysical in character, as, *e.g.*, causation, arise, instead of ignoring or smothering them with some useless dictum, this type of lawyer will make an effort to treat them by putting forward some definite doctrine, as Sir Frederick Pollock has done in his work on the Law of Torts :(d) he will further think it necessary to note the possibility of the psychological view being contrary to the legal one and to explain *en passant*—albeit briefly and dogmatically—why the former must be rejected.

It is the existence of this second class of lawyers, though we fear they are much in the minority, that has encouraged us to publish the present work. Their attitude gives us some glimmering of hope : they do not appear to us so determined to shut out all new sources of knowledge merely because their predecessors were ignorant of them or refused to avail themselves of their aid. But at present we have to lament that, though they have relaxed their sentiments and widened their views to a certain limited extent, so strong is the force of legal training and the habit of the legal mind, that those who administer the law have not hitherto shewn themselves ready to accept these expressions of opinion or to

(a) See Ameer Ali and Woodroffe's 2nd Edn. of the Indian Evidence Act Introduction, pp. cxxxiv—v.

(b) *Ibid*, p. cxx, note 2.

(c) *Ibid*, p. 642.

(d) See his explanation of the doctrines of “immediate” and “proximate” causes, and of “natural and probable consequences” discussed in our chapters on Causation and the Theory of the Normal Man.

apply them in cases, even though they would now have authority on which to lean.

2. We shall now proceed to justify by a few quotations the statement made above as to the hostility of lawyers to philosophy. A living American lawyer says, very truly, that you can trace the subtle influence of the philosophy of the schoolmen in the English system even in the present day. That philosophy, it is true, perished at last, but it has left its impress, deeply stamped, on modes of thought. "The old lawyers," says Mr. Bigelow, "were from the beginning of their education steeped in philosophy as something apart, and they carried it as of course into their legal studies, into their arguments at the bar, into their opinion from the bench. Generation after generation inherited the vice, in constantly lessening quantities fortunately, but down to this very day in quantities large enough to account for no small part of the feeling of disrespect for the law." (a) "There is a point," says Sir F. Pollock, "where subsequent events are, according to common understanding, the consequence not of the first wrongful act at all, but of something else that has happened in the meanwhile, though, but for the first act, the event might or could not have been what it was. But that point cannot be defined by science or philosophy; and even if it could, the definition would not be of much use for the guidance of juries. If English law seems vague on these questions, it is because, in the analysis made necessary by the separation of findings of fact from conclusions of law, it has grappled more closely with the inherent vagueness of facts than any other system. We may now take some illustrations of the rule of 'natural and probable consequences' as it is generally accepted. In whatever form we state it, we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself

(a) Bigelow's Annual Address to the New York Bar Association, quoted by

Dr. Rashbehary Ghose in his 3rd ed. of the Law of Mortgage in India.

with philosophers in the logical and metaphysical controversies that beset the idea of cause." (a)

Again speaking of negligence the same author says: "This, it will be observed, says nothing of the party's state of mind, and rightly. Jurisprudence is not psychology, and law disregards many psychological distinctions, not because lawyers are ignorant of their existence, but because for legal purposes it is impracticable or useless to regard them. Even if the terms were used by lawyers in a peculiar sense, there would be no need for apology; but the legal sense is the natural one." (b) He further quotes the distinction drawn between a cause and a condition by Mr. Wharton, and remarks: "But the contrast of 'cause' and 'condition' is dangerous to refine upon: the deep waters of philosophy are too near." (c)

Philosophy then, according to this writer, is to be avoided because it is both useless and dangerous. This recalls to us a remark of the late Prof. Jowett: "The uselessness of philosophers is explained by the circumstance that mankind will not use them. The world in all ages has been divided between contempt and fear of those who employ the power of ideas and know no other weapons." (d)

Yet without the aid of philosophy it is difficult to meet new situations, and there are signs that a new situation will have to be met even in the conservative realm of law. Men are chafing under the restraints of the present system: they feel that it is antiquated and has failed to adapt itself to the march of the times, and that what should be the servant of their social needs has become instead a tyranny and an anachronism that cramps their progress. When the face of the world is beginning to alter and with fresh knowledge and discoveries ideas are changing, it is useless for lawyers to be guided by their old maxims and to repeat the old saws that were framed to suit the circumstances of

(a) Pollock on Torts 6th Ed., pp. 35-6.

(b) *Ibid.*, p. 421.

(c) *Ibid.*, p. 447 note 1.

(d) B. Jowett, Introduction to the Republic of Plato, 2nd Ed., pp. 78-79.

a bygone generation. It is perceived that there is need of reformation in law and that reformation must come from outside, for the lawyers themselves are not the persons to accomplish it. (a) To them, with but slight alteration, may be applied what Buckle wrote of the Scotch clergy (b) :—" They assumed the truth of their own religion and moral notions, most of which they had borrowed from antiquity : they made those notions the major premises of their syllogisms and from them they reasoned downwards till they obtained their conclusions. They never suspected that premises taken from ancient times, might be the result of the inductions of those times, and that as knowledge advanced, the inductions might need revising."

Write 'judges' for 'clergy' and 'legal' for 'moral' notions and we have a description of our lawyers of to-day. "All that they were concerned with," says Buckle, "was to beware that no error crept in between the premises and the conclusion" : this is the attitude of the formal logician and of our legal writers. They aim not at truth but logic, which is the parody of truth, and the parody of it is worse than its absence ; for it is often injustice disguised. But men will not accept the conclusions however much they may follow from the premises when they question those premises themselves : they have no confidence in legal presumptions which contradict their experience and psychological knowledge, and they have no desire to be governed by precedents which have no application to what occurs in real life. They resent the attitude of those who always look backwards and refuse to listen to anything new : they see that while every other science and branch of knowledge is progressing the law alone remains crystallized and immoveable, and if anything fresh is forced upon the notice of the lawyers it is always legally 'aperceived' in the sense of past conclusions. Nor is this resentment unreasonable : the legal manner of suppressing everything new finds a parallel only in the behaviour of primitive societies which

(a) See p 10-11 *post*.

(b) T. H. Buckle, History of Civilization, Vol. III, p. 286.

are thus described by Prof. Stout: "In more primitive communities such as we find among savages, the general stock of ideas is assimilated by each individual, and all are equally its guardians. Thus the pressure of society upon the individual is incomparably more coercive. Any private rebellion against inherited and accepted tradition would be resented and suppressed with great speed and certainty. Thus primitive societies are intensely conservative and remarkably unanimous in their modes of thought. Each thinks as the rest think, and dares not persevere in any innovation which does not find general acceptance. Ideal activity is on the whole more occupied in finding reasons to justify tradition or to explain its apparent inconsistency with actual experience, than in further developing and improving the ideal scheme which has been handed down from generation to generation." (a)

What seems to us surprising is that lawyers should ever have blindly put their trust in precedents, when we consider what precedents mostly are: for they are not principles but attempts to elevate the concrete into the universal. It is clear that it is impossible to construct rules to meet all the complexities of human life, and even if it were otherwise, such rules would need constant revision. For it has been well said that what is the paradox of one generation is the common place of the next.

That there is a demand for some reformation seems to be dimly comprehended even by some legal writers: the existence of those to whom we have referred as the second class of lawyers indicates this, and their sentiments betray a consciousness that the old legal rules are breaking down. (b) The fact is that the lawyer, pure and simple, is over-specialized, and hence mutilated and stunted in his nature: for to be special in any function means to be rendered, to some extent, one-sided and narrow, (c) and this partly

(a) Stout, *Manual of Psychology*, pp. 533-4.

(b) See *e.g.*, Sir F. Pollock, *Principles of Contract*, 7th Ed., p. 7: "The truth is, as I venture to think, that the exclusive pursuit of the analytical

method in dealing with legal conceptions always leads into some strait of this kind, and if the pursuit be obstinate, lands us in sheer fictions."

(c) F. H. Bradley, *Appearance and Reality*, p. 422.

explains why he rigorously excludes all sources of knowledge that are not contained in his own text-books. Those who cry for a trained lawyer to be their judge know not what they ask. If justice is to be valued above technicality and truth above logic, we cannot afford to neglect the assistance which can be derived from other learning beside that of the Statute-book in solving the problems of human life, and among such aids must be numbered the conclusions of psychology and, to a lesser extent, the teaching of metaphysics.

[3.] The reader may perhaps be disposed to challenge the statement that there is dissatisfaction among laymen with the present state of the administration of the law. From among many such expressions of disapproval that we have seen we shall therefore select two for quotation here.

Evidence of dissatisfaction with the existing administration of the law.

“To our great regret,” writes Prof. Haeckel, “we must endorse the words of Alfred Wallace: ‘compared with our astounding progress in physical science and its practical application, our system of government, of administrative justice, and of national education, and our entire social and moral organization remain in a state of barbarism.’ To convince ourselves of the truth of this grave indictment we need only cast an unprejudiced glance at our public life or look into the mirror that is daily offered to us by the press, the organ of public sentiment. We begin our review with justice, the *fundamentum regnorum*. No one can maintain that its condition to-day is in harmony with our advanced knowledge of man and the world. Not a week passes in which we do not read of judicial decisions over which every thoughtful man shakes his head in despair; many of the decisions of our higher and lower courts are simply unintelligible. We are not referring in the treatment of this particular ‘world-problem’ to the fact that many modern States, in spite of their paper constitution, are really governed with absolute despotism, and that many who occupy the bench give judgment less in accordance with their sincere conviction than with wishes expressed in higher quarters.

We readily admit that the majority of judges and counsel decide conscientiously and err simply from human frailty. Most of their errors, indeed, are due to defective preparation. It is popularly supposed that these are just the men of highest education, and that on that very account they have the preference in nominations to different offices. However, this famed 'legal education' is for the most part rather of a formal and technical character. They have but a superficial acquaintance with that chief and peculiar object of their activity, the human organism, and its most important function, the mind. That is evident from the curious views as to the liberty of the will, responsibility, etc., which we encounter daily most of our students of jurisprudence have no acquaintance with anthropology, psychology and the doctrine of evolution—the very first requisites for a correct estimate of human nature. They have 'no time' for it; their time is already too largely bespoken for lighter pursuits and purposes. Their scanty hours of study are required for the purpose of learning some hundreds of paragraphs of law-books, a knowledge of which is supposed to qualify the jurist for any position whatever in our modern civilised community." (a)

Prof. James speaks of the spirit in which the legal profession carries out the work which the community has entrusted to them, in the following words:—"It is a matter unfortunately too often seen in history to call for much remark, that when a living want of mankind has got itself officially protected and organised in an institution, one of the things which the institution most surely tends to do is to stand in the way of the gratification of the want itself. We see this in laws and courts of justice too often do the place-holders of such institutions frustrate the spiritual purpose to which they were appointed to minister, by the technical light which soon becomes the only light in which they seemable to see the purpose, and the narrow way which is the only way in which they can work in its service." (b)

(a) E. Haeckel, *The Riddle of the Universe*, R. P. A., Ed., 1903, p. 3.

(b) W. James, *Human Immortality*, p. 7.

If we are asked to explain this dissatisfaction we should say that men have begun to recognise that the law does not meet the wants of their daily life, because it deals with unrealities and fictions. On seeking the causes of this it has become plain that the methods of the law and the legal education which is given to those who are to administer it are calculated to produce nothing else but artificial results, and we shall now endeavour to show how this situation has come to pass.

4. The world of our law courts is not something independent, as the lawyers strive to make it, but is a mere element in our total experience : to attempt therefore to shut themselves off from the rest of existence and be guided by presumptions and arguments that have no validity elsewhere is an impossible attitude for men who have to decide on the merits of claims that arise out of real life. Now we trust that we shall not be misunderstood on this point : we are aware that the object of the law is not the ascertainment of ultimate truth in the metaphysical sense, and that the ideas, with which it works, are not intended to set out the true character of reality : hence to subject these ideas to metaphysical criticism, without any further object, would be to mistake their end. The question, as we conceive it, is not whether legal principles possess an absolute truth to which they make no claim, but whether the abstractions, employed by the law, are legitimate and useful or even possible without injustice and error resulting. If legal writers admitted that the law was an abstract science and its subject matter consisted of abstract beings, and that it presumed that all of them were of the 'average' or 'ordinary' type, *e.g.*, the man of average prudence, the typical reasonable man, the man of common care and caution, etc., and that all the acts and statutes and commentaries on them and precedents and legal decisions were an intellectual construction intended to explain the conditions under which such beings acted, to systematize and enable us to understand their ways and the occurrence of events among them, then our attitude

Reasons of this dissatisfaction.

Relation of the law to metaphysics and the other sciences.

in the matter would be different. (a) We should study them as the laws of a class of phenomena simply regarded by themselves, and we should look upon this legal construction as a convenient method of considering certain facts apart from others: if it were found that some of these ideas contradicted themselves or in the end were not true, we should not trouble, provided that on the whole they played their part in enabling us to understand our subject and draw exact conclusions. We should then consent to apply these conclusions, as far as we found them useful and with the necessary modifications and limitations which we should expect to have to make, to the circumstances of real life and the real men whose affairs we had to determine. But while quite willing to avail ourselves of the aid of these legal conclusions we should not regard their existence as any reason for excluding the conclusions of other sciences, and among them psychology, which we might find equally or more useful for the work in hand.

The case in short would be precisely similar to that of Political Economy regarded as an abstract science. Assuming that men are guided entirely by selfish motives and aim solely at wealth, as did Ricardo and Adam Smith in his treatise on the Wealth of Nations, exact conclusions may be drawn which will apply under such abstract circumstances: but the inevitable result follows that, as all men are not selfish and many are guided by other considerations than that of wealth, the conclusions of Political Economy must be greatly modified in their application to daily life, and no sagacious politician dreams of framing his measures as though the economic end was the only or even the supreme end of the State. He will look also to the conclusions of Ethics, *Æsthetics*, Political Philosophy and whatever has influence on the lives and thoughts of the citizens. Abstract conceptions are intended for the purposes of science rather than for application to each case that arises in daily life. This has been very clearly expressed by Dr. J. Ward in his comparison between the mechanical method of Physics and

(a) Cf. Bradley, *Appearance and Reality*, pp. 283-4, where the relation of

metaphysics to natural science is discussed.

Economics.(a) "The science of so-called pure or deductive economics has much in common with physics, that is to say, it sets out from definitions and axioms and seeks to describe economic facts by means of mathematical equations. The 'Economic Man' as conceived by Ricardo, a 'Market' as defined by Cournot, James Mill's 'Doses of Capital,' the 'Margin of Cultivation,' or Jevons' 'Supply and Demand Curves,' are not things we expect to meet with in real life. They are abstractions that summarise experience, not concrete realities directly experienced.....Again, the Englishman or the Frenchman, or the civilised man or the savage is a concept not a reality. Yet a science of anthropology is possible in which different races of men and different stages of human development are compared by the help of mean values obtained by dealing with nations and societies *en bloc* and perhaps 'in this way,' as Lotze has said, 'we may easily imagine how all kinds of formulæ may be arrived at, expressive of the acceleration and breadth and depth and colouring of the current of historical progress, formulæ which, if applied to particulars, would be found to be utterly inexact, but which can yet claim to express the true law of history as freed from disturbing individual influences.'.... Try to picture to yourselves the sort of science of man and of society that would be formulated by an intelligence whose data were confined to anthropometrical and other statistical results and who treated his data in the customary physical fashion. You will conclude, I think, that his human beings or homunculi would come out surprisingly like Herschel's molecules as 'manufactured articles,' and that this theory of society would have more than a superficial resemblance to the kinetic theory of gases.'

Now the same is true in principle of law: it also has its own definitions from which it sets out, a separate legal meaning of terms which need in no wise correspond to that given them in real life, its maxims which it regards as axioms and its presumptions by which it seeks to determine from such data its matters of fact and law. Its 'average man,' 'reasonable man,' 'man of ordinary

(a) J. Ward, *Naturalism and Agnosticism*, Vol. I, pp. 110—111.

prudence,' etc., are abstractions merely that summarise experience not concrete realities, and by the help of such conceptions it deliberately seeks 'to be freed from disturbing individual influences.' And will not the result be the same? Its formulæ when applied to particulars will be found to be "utterly inexact," and its human beings or homunculi constructed in such fashion surprisingly like 'manufactured articles.'

Our lawyers have made a fetish of what they term 'certainty,' and in their efforts to obtain it in their decisions have hurried blindly into generalisations and made the reality conform to the abstract rather than the abstract to the reality: they have abandoned the substance for the shadow, the matter for the form, and the certainty which they thereby achieve, in so far as they achieve it, is as mechanical as the aim of the physicists. Like them they have preferred calculability to truth, simplification to reality, and have sought to cover the nakedness of their conclusions by ascribing as it were objective existence to the abstractions which they formed: for this is in fact the effect of treating such conceptions as the only matter existent for law. Nor have they ever grasped the truth that when you have reduced things to a formula you have only got a description of facts not an explanation of them.

We thus contend that the lawyers do not appreciate the situation: their work is to decide the cases and the suits of living men and not abstract beings, and these men act under particular circumstances and are influenced by motives that are not necessarily normal and general, but are always determined by some special consideration. The reasonable course to take would be to regard the legal presumptions and conclusions as capable of application only with modifications and approximately, and to correct them wherever they are found to conflict with the conclusions of other sciences that are more deeply concerned with that department of human life. For example, in the realm of mental qualities, human motives and conduct, legal presumptions must yield to the conclusions of psychology when they

Duty of lawyers
to avail themselves
of the conclusions of
other sciences.

clash, for psychology has specially studied this branch: on the questions of responsibility and punishment the precepts of moral philosophy should not be ignored—and indeed lawyers may be reminded that they are the basis of equity—just as in one department, viz., that of medicine, the lawyer admits that he must bow to the decisions of an expert science in matters relating to insanity and problems requiring a knowledge of anatomy, poisons, etc. What, however, is the attitude of the legal profession ~~in the matter?~~ Instead of having recourse to the assistance of these sciences in matters where they are ignorant, they draw a number of arbitrary presumptions as, e.g., that a man must be presumed to know and therefore to intend the probable consequences of his act, which contradict both the teachings of other sciences and the experience of mankind, and they seek to apply general rules in the shape of legal maxims to particular cases, purposely excluding from consideration the very circumstances that make the cases particular. Nor do they disguise the fact but justify this legal shorthand by assertions such as that it is impossible to enter into all the considerations which affect each case as litigation would never terminate, and they could never arrive at any certain decision: in short the law cannot embrace all the complexities of human life—it is *subtilitati vitæ humanæ longe impar*. The reply to this seems to be: such attempts to concrete the abstract are unwarrantable and impossible of success; if your decisions avowedly do not cover the whole case, your methods are artificial and fictitious and cannot produce anything but injustice. We do not want you: you should get out of the position that you have arrogated to yourselves and abate your pretensions to deal with real life.(a)

The revolt against the unrealities of the law is similar to the re-action in the philosophical world of the Pragmatists or Humanists against the older Intellectualism. It is due in both cases to a demand that man shall be taken as he is and

Similar revolt in philosophy against the unreality of certain systems of thought.

(a) For further remarks on the meaning of Real Life, see Chap. VI.

shall not, by a species of abstraction, be deprived of the qualities which entitle him to the name of man and left a mere abstraction which may be easier to handle but which does not represent any reality which has ever had any actual existence.

The philosophical justification for this revolt began with the recognition that the real for us must be what is knowable to us, and that it is idle to attempt to abstract from reality the subjective side, *i.e.*, the part which the individual's knowledge plays in the matter. It went on however from this basis to develop the view that each individual makes his own reality what it is. "But this truth (*i.e.*, that reality is conditioned by our knowledge) is incomplete until we realize all that is involved in the knowledge being *ours* and recognize the real nature of our knowing. Our knowing is not the mechanical operation of a passionless, pure intellect, which

Grinds out good and grinds out ill,
And has no purpose, heart or will.

Pure intellection is not a fact in nature ; it is a logical fiction which will not really answer even for the purposes of technical logic. In reality our knowing is driven and guided at every step by our subjective interests and preferences, our desires, our needs and our ends. These form the motive powers also of our intellectual life." (a)

This school of philosophy insists that we cannot expunge from our thinking every trace of feeling, interest, desire and emotion, for these influences are all pervasive in our thinking, but we must be "content to take Man on his own merits, just as he is to start with, without insisting that he must first be disembowelled of his interests and have his individuality evaporated and translated into technical jargon before he can be deemed deserving of scientific notice." Man is the maker of the sciences which subserve his human purposes and he is greater than any method which he has made. He will recognise the rich variety of human thought and

(a) F. C. S. Schiller, *Humanism*, pp. 9-10.

sentiment and will not ignore actual facts for the sake of bolstering up the narrow abstractions of some *à priori* theory of what 'all men must think' and feel under penalty of scientific reprobation, abstract *dicta* which by themselves mean nothing, and whose real meaning lies in the applications, which are not supplied.(a)

Our interests impose the conditions under which reality is revealed to us, we only attempt to know what are objects of actual desire : reality and the knowledge thereof presuppose a definitely directed effort to know, and this effort is purposive, *i.e.*, it is necessarily inspired by the conception of some good at which it aims. "Neither the question of *Fact*, therefore, nor the question of *Knowledge*, can be raised without raising also the question of *Value*. Our 'Facts' when analysed turn out to be 'values,' and the conception of 'Value' therefore becomes more ultimate than that of 'Fact.' Our valuations thus pervade our whole experience and affect whatever 'fact,' whatever 'knowledge' we consent to recognise."(b) We have thought it worth while to quote these passages because they explain the importance of individuality in every case. If the individual makes his 'facts' and his 'knowledge' for himself in this way, you cannot take away his individuality and expect to arrive at the truth by a mere consideration of objective results as they appear to others, or should appear to a typical man.

Yet this is the method of the law. Like the old intellectualists who sought to arrive at the truth by abstracting feeling, emotion, and whatever is particular to the individual man, and dealing with a *residuum* of pure thought, so our lawyers have abstracted all that is connected with the individual, all his particular feelings, his special environment and circumstances, and have then endeavoured by general presumptions and the construction of abstract legal conceptions such as that of the average man, to arrive at a true conclusion concerning the conduct of the same individual. How can they expect by such a method to reach any result that is even remotely connected with the reality.

(a) F. C. S. Schiller, *Humanism*, pp. x & xx-xxiii.

(b) *Ibid*, p. 10.

To one outside the legal circle it appears that they have become slaves to a method which is a radically bad one : they have forgotten that man is the maker of his methods, and that, if those methods fail, it lies with him to reform them. Most do not even see that their method not only does fail but must necessarily fail ; on the contrary they are satisfied with a system which appears to the plain man to be deplorable both because of the actual injustice it works and the blind prejudice of its authors.

6. We owe it perhaps to the reader to explain also our feeling towards the employment of what are now recognised fictions in law. We take it to be admitted that the English law is full of such fictions, but that the lawyers as a body would maintain that it is none the worse for that, but rather the better, inasmuch as by their means they have been able to introduce ideas which would have been excluded by the legal traditions, to reconcile new decisions with old ones, and to deal with and determine questions which come before them, many of which they would otherwise be unable to decide. We use 'fiction' here in the sense in which Sir Henry Maine employs it, to signify "any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." (a)

It is not supposed by us that it is sufficient to point out that a thing is a fiction in order to condemn it : if it answers the purpose for which it has been framed we have no objection, provided that the purpose is not a wrong one and that it does not produce harm in other respects. Now as regards the purpose, it appears to us that whatever may have been the use of fictions in the past, they are not needed now. Sir Henry Maine defends them as 'particularly congenial to the infancy of society' because they satisfy the desire for improvement which is not quite

(a) Maine, *Ancient Law*, 10th Ed., p. 26.

wanting and at the same time do not offend the superstitious dis-relish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, etc.(a) He goes on, however, to allow that they should not be stereotyped in our legal system ; “ there are several fictions still exercising powerful influence on English jurisprudence which could not be discarded without a severe shock to the ideas, and considerable change in the language of English practitioners ; but there can be no doubt of the general truth that it is unworthy of us to affect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now among other disadvantages legal fictions are the greatest of obstacles to symmetrical classification.”

We have not much sympathy with this last ground of objection, but we welcome the expression of these views as a whole, because they make it clear that such fictions of law are, or should be, a thing of the past ; and in so far as they are retained to spare the feelings of the legal profession the rude shock of the introduction of new ideas in the form of the real explanations of the matters before them, we cannot refrain from regarding that profession as a drag on the wheel of progress. Speaking of progressive societies the last-quoted writer says “ it may be laid down that social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to re-open. Law is stable ; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed.(b)

It is our deliberate opinion that the abolition of all such fictions would be an aid to closing this gulf, and in so far as they are either intended to exclude, or actually result in excluding, a recognition

(a) Maine, *Ancient Law*, 10th Ed., pp. 26-27.

(b) Maine, *op. cit.* p. 24.

of the true state of affairs and the real principles on which decisions are given by the law on the circumstances of daily life with which it is forced to deal, we must insist that both the purpose of these fictions is a wrong one and their effect harmful. They only mystify the plain man and create the impression in him that the law does not aim at the truth: we hold that this should always be the legal aim, and that it is not a sufficient apology to say that the law is only intended to deal with the facts that come before it in a rough and ready way. It appears to us to be a poor consolation that you have got a decision of some kind, if it is admitted to be a wrong one, or to be probably erroneous, or one that does not cover the facts of the case, or if it is avowedly based on reasons which are not the true ones. Not only has it failed in the proper aim of a decision, but by its very existence it has deprived you of the opportunity of getting something better, and our belief is that this is the usual result of accepting fiction for reality.

And when we speak of fictions we mean not merely fictitious explanations, but also the assignment of arbitrary meanings to terms which conflict with the sense in which they are usually employed by the plain man. We are aware that it is openly denied, *e.g.*, by Sir Frederick Pollock,^(a) that the lawyers are under any obligation not to use terms in a peculiar sense, though he immediately adds that the legal sense is the natural one, but we conceive this view to be a mistaken one, and for the following reasons. If you take a word like 'malice' or 'intention' which stands for something known to the experience of the ordinary man and apply it to something else not so experienced, you clearly make use of a fiction. But by the use of this fiction you cannot abolish the reality, although you may try to do so by speaking of a 'legal sense,' 'excluding from law, etc.': you must at least always keep in mind the two meanings of the term in order to distinguish them and prevent the intrusion

(a) Pollock on Torts, p. 421.

of the popular sense which you believe will be mischievous in law. And now mark the result: your working fiction must not be allowed to distract you from the attentive study of the genuine fact, and the full nature of the genuine fact, when you apply your fiction, must be kept resolutely out of view. Otherwise neither can you profess to be dealing with the real thing that is before you, nor can you possibly succeed in applying your key to the situation: and this feat has to be performed in the course of one and the same investigation. We do not believe that it can be done, but confusion is bound to result, of which we hold we have given many examples in the course of this volume: but at all events if we are mistaken as to the possibility of this feat on the part of the lawyers, we feel certain that the plain man is unable to follow them, and hence he is bound to be dissatisfied with interpretations of the law which he cannot comprehend.^(a) If it is really necessary for purposes of law to invent a new state of mind, &c., to adequately describe which no corresponding term is already in existence, it would be far better to invent also an entirely new term as a counterpart, rather than by taking terms which already have an established meaning to risk the confusion that must spring from such a struggle against language when you try to force on them a significance inconsistent with the one they already bear.

“It is in practice,” says Sir J. Stephen, “almost impossible to divest words of their natural meaning,”^(b) and again when discussing the use of the terms ‘malice’ and ‘malicious’ in English law, he says that the administration of criminal justice is based upon morality, “it is therefore absolutely necessary that legal definitions of crimes should be based upon moral distinctions, whatever may be the difficulty of ascertaining with precision what those distinctions are; and it will be found in practice impossible to attach to the words “malice” and

^(a) Cf. Bradley on Conation, Mind
N. S. 40, p. 448.

^(b) Stephen, Introduction to the
Indian Evidence Act, Ed., 1872, p. 5.

“malicious” any other meaning than that which properly belongs to them of wickedness and wicked.”(a)

7. Now that the general grounds on which it is held that the application of psychology to legal evidence is justified have been stated, more particular reasons will be adduced drawn from psychology and the law itself.

Particular reasons
for the application
of psychology to
law.

In the first place psychology is in a sense the basis of all the mental sciences, to which law would claim to belong. “As the science of the universal forms of immediate human experience and their combination in accordance with certain laws,” says Wundt, “it (*i.e.*, psychology) is the foundation of the mental sciences. These sciences treat in all cases of the activities issuing from immediate human experiences, and of the effects of such activities. Since psychology has for its problem the investigation of the forms and laws of these activities, it is at once the most general mental science, and the foundation of all the others, that is of philology, history, political economy, jurisprudence, etc.”(b)

Psychology is the positive science of mental process:(c) its *data*. are (1) introspection or perception of what takes place in our own mind, (2) retrospection or remembrance of past psychological processes in our mind, (3) observation of the outward signs of what passes in the minds of others or even in one’s own mind.(d) These *data* cover the ground of much with which the estimation of evidence is concerned and, if it be suggested that common sense can take the place of psychology the implied opposition between them is not warranted. Their relation is thus described by Prof. Sully :—“Here again mental science is supplementing and rendering precise the inductions reached by popular thought. Men have for ages observed certain relations of dependence between circumstances and character, and one trait of character or

(a) Stephen, A General View of the Criminal Law of England, p. 82.

(b) Wundt, Outlines of Psychology, p. 17.

(c) Stout, Analytical Psychology, Vol. I, p. 1.

(d) *Ibid*, p. 13.

habit and another. All the well-known sayings about character and life embody these observations. Such Trite remarks as "experience is the best teacher," "first impressions last longest," contain the rough germ of psychological truths. The psychologist seeks to take up these "empirical generalisations" into his science, exhibiting them as consequences of his more accurate scientific laws.(a)

It is thus no objection to say, "Oh, we know this without psychology:" you may guess it or you may have observed already that what psychology says is true, but with the aid of psychology you will know it better, for you will now understand the reasons. This knowledge will enable you to anticipate what would otherwise be merely unexplained departures from the general rule expressed in the popular saying.

Under s. 114 of the Indian Evidence Act 'the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case,' and "fact" is defined in s. 3 of the same Act 'to mean and include (1) anything, state of things, or relations of things, capable of being perceived by the senses ; (2) any mental condition of which any person is conscious.' It can hardly be denied that the study of psychology will assist in deciding whether such a mental fact is likely or not to have occurred : *e.g.*, whether two persons could both have been present and yet observed so differently, whether recollections could really have varied to such and such an extent, what is likely to be due to illusion, to prejudice, &c., &c.

In s. 8 again it is said that 'any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact,' and motive is directly treated of in psychology, while s. 14 is almost entirely psychological. "Facts showing the existence of

Quotations from
the Evidence Act of
psychological pas-
sages, and from legal
writers on evidence.

any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant.”

Section 159 deals with refreshing memory, and if necessary other examples could be cited both from this Act and the civil law, while the question of intention enters into practically every criminal offence and many contracts.

Further the necessity of psychology is admitted by almost every writer on evidence as will be illustrated by a few quotations here, and many others implying the same will be found throughout the work. A large part of the opening chapter of Best's *Treatise on Evidence* consists of quotations from Locke's work on the Human Understanding, and speaking of presumptions he says “the grounds or sources of presumptions of fact are obviously innumerable—they are co-extensive with the facts, both physical and psychological which may under any circumstances whatever become evidentiary in Courts of Justice; but in a general view, such presumptions may be said to relate to *things, persons* and the *acts and thoughts* of intelligent agents.....Under the third class—namely, the acts and thoughts of intelligent agents—come, among others, all psychological facts: and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature.”(a)

Another commentator writes :—“The mental and physical conditions of a person must then be proved by the evidence of other persons who speak to the outward manifestations known to them, of states of mind and body. Such manifestations may be either by conduct, conversation or correspondence,”(b) and so far as the general rule relating to experts goes, there seems no reason why the services of an expert psychologist should not be employed, in the

(a) Best on Evidence, § 316.

(b) Ameer Ali and Woodroffe, *op. cit.*, p. 126.

same way as doctors are examined on questions of insanity. "The weight of such (*i.e.*, expert) evidence depends on the maxim *cuilibet in arte sua credendum est*, and the grounds of its admissibility are contained in the general rule 'that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject-matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance: in other words when it so far partakes of the character of a science or art, as to require a course of previous habit or study in order to obtain a competent knowledge of its nature.'"(a) In one passage the duty of the Court is laid down as involving considerable knowledge of psychology, it being left to the Court to attach to the evidence of the witnesses "that amount of credence which it appears to deserve from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction, as ought to justify a man of ordinary prudence in acting upon those statements."(b)

Speaking of the object and scope of cross-examination it is said that a witness may be asked "all questions tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment,"(c) subjects which embrace the greater part of psychology. It seems clear that if such questions are to be asked a knowledge of psychology would be valuable not only to the judge, but also to the cross-examining advocate, while ignorance of it may very easily result in much useless questioning and waste of time. Finally we may remark that whenever a judge gives reasons for his belief or disbelief of evidence he involuntarily strays into psychology.

(a) Ameer Ali and Woodroffe, *op. cit.*, pp. 376—7.

p. 566.

(b) C. D. Field, *Law of Evidence*,

(c) Ameer Ali and Woodroffe, *op. cit.*, p. 950.



8. These passages from the Act and commentaries have been cited because, in view of the prejudice which exists in law against all branches of philosophy, we thought it well to show from the writings of the lawyers themselves that they admit the psychological character of some of the evidence with which they deal. Our complaint is that in spite of this admission they have hitherto altogether neglected this side of their work, for we are not acquainted with any treatise on evidence, or indeed on any branch of either the civil or criminal law, which could be described as even attempting an adequate treatment of the psychological questions which arise for discussion. What some of those questions are will become sufficiently plain in the course of this work, though it is not claimed that this volume exhausts them : it is merely offered as a contribution to the subject.

We have little doubt that this singular neglect on the part of our lawyers of a subject, the importance of which can be deduced even from their own writings, can be explained mainly on two grounds, *viz.*, the prejudice against philosophy in any shape already mentioned and ignorance of what psychology is able to teach. Every lawyer learns the same legal catechism and it contains no vow to study psychology : like the Church he has his creed, but it teaches him that in order to be saved it is not necessary that he holds any psychological faith : his dogmas are as immutable as those of Catholicism and he will not permit himself to look beyond them at anything which might cast doubt upon the doctrines of his sect : any difficulties or inconsistencies that arise he meets with a true ecclesiastical positiveness and a more obstinate re-assertion of principles the futility of which he is not aware. Hence he condemns with confidence what he does not know and pronounces useless what he has never read : we would wager that the ordinary lawyer when he denounces psychology as unpractical, visionary and the like, is in reality denouncing what is to him nothing more than a name ; that he has never opened the page of a psychological volume but has taken his views entirely on trust from

some legal writers whose qualifications to pronounce an opinion on the subject are little better than his own. For the way of this profession is to regard all truth as contained in the statutes and decisions on them, and to seek for knowledge outside these is to them like the search for a fourth dimension to the mathematician : like the hypnotic patient who has eyes for the operator alone, by a species of legal rapport they are attracted only to commentaries and codes, and to question the correctness of a precedent is for them what it would be to a scientist to doubt the law of gravitation.

It is this frame of mind that we regard as the chief obstacle to our endeavour : the fact that our study of psychology has led us in the following pages to attack some presumptions and decisions of law that form the articles of legal belief will, we fear, be sufficient alone with some to condemn us : for, if these legal formulæ are destroyed, what has the lawyer left ? He has spent his life among them and knows nothing else : he explains everything by them, and if you analyse his decisions you will find anything in the way of shallow reflection on the legal form, anything rather than the effort to grasp the content. It is on the contrary the content to which we look : it is to help us to understand the matter, the real thoughts and actions of men, that we call in the aid of psychology, for it appears to us that to be content with drawing general presumptions and forcing particular instances under certain legal heads is, in many cases, merely to shirk the difficulty and to make a pretence of arriving at the truth.

“The suspicion is in the air now-a-days,” writes Prof. James, “that the superiority of one of our formulæ to another may not consist so much in its literal ‘objectivity,’ as in subjective qualities like its usefulness, its ‘elegance’ or its congruity with our residual beliefs.”(a) So it is that we cannot reverence legal formulæ merely as such, many of which seem to us mere copy-book headings or caricatures of explanations, and if the application of psychology

(a) W. James, *Humanism and Truth*, Mind N. S. No. 52, p. 460.

succeeds in destroying some of these, we think that something will have been done to lessen the 'iniquity of the law' which has become a by-word among those who do not belong to the legal profession.

9. We confess then that we are not in sympathy with the present aims or methods of the legal profession, and we think that they do not achieve the results which they imagine. Their claim to administer justice successfully we should deny, though we are prepared to admit that a genuine effort has been made on their part to attain what we can only regard as a perverted ideal. Many are irritated, we believe, at the self-complacency with which they arrogate to themselves a title to be considered the most intellectual body of men who are at once the sole depositaries of legal truth and above the criticism of others outside their own circle, and it appears to us that this disposition is the result not of merit but of centuries of past blindness to what has been actually going on around them. This blindness still continues and is the bar to the admission of any new knowledge and to the recognition of their own failure to fulfil adequately a direct duty owed to the society which employs them by entrusting to them the administration of justice. It is to meet an attitude of this kind that we have been compelled to be outspoken in our criticisms in the following pages, and if it should be objected that this work is entirely destructive and such results as may be attained purely negative, we should maintain that even so our effort is justified. For it is necessary as a first step to raise some doubts in the minds of the lawyers as to the infallibility of their existing methods and the perfection of their present results, by insisting on the dissatisfaction with their decisions felt by some laymen. This can only be done by attacking the idols which they now worship, and when these have been dethroned we may perhaps venture to hope that they will recognise the existence of other knowledge hitherto ignored by them but which the non-legal mind is unable similarly to disregard.

CHAPTER II.

INTENTION.

Will defined—Intention and Will—Impulsive and Voluntary Acts—Impulse, Desire, Deliberation, Purpose, Resolve—Intention belongs to the higher forms of Will—Attention in Will—Instinct—Motive—Desire in Motive—Actions divided into two classes, those done on instinctive impulse and those done on conscious desire—Feeling determines action—Influence of the intellectual factor—Self-consciousness in Will—The legal theory that knowledge equals intention and that everyone must be presumed to know the natural results of his acts—Objections to the theory—Knowledge and Probability—Knowledge and Intention—Results as the criterion of Actions—The theory an artificial one which does not deal with reality—it is further a *petitio principii*—and also unfair to the accused in criminal cases—Part of it inapplicable to particular cases—It is not consistently applied—Attempts of Judges to evade it—The doctrine also inconsistent with the language of the law.

It is proposed in this chapter to treat of Will, Voluntary Actions, Intention, Motive, Impulse, Instinct and other similar mental states. Their importance in law and the numerous cases in which they have to be considered will become so plain in the course of the discussion that it is perhaps unnecessary to give examples at the outset: our object will be to give definite meanings to these terms and to point out where those accepted in law are opposed to the psychological view, and further to state the reasons why the present legal acceptations are unjustifiable or erroneous.

In every criminal act it is as important to prove the intention with which it was done as it is necessary to prove the deed itself, and as this is in many cases accomplished by presumption we shall have occasion to examine the validity of such presumptions as are usually drawn; one method of doing so will

be to compare them with what psychology teaches, and it will therefore be convenient to start with a few psychological conceptions.

Most people think that they know what they mean when they use the expression 'will,' but when they compare their idea of 'will' with someone else's, or examine some given instance in order to decide whether it was an expression of will or not, they find that their ideas differ and they cannot define 'will' in terms sufficiently clear for their purpose. It seems necessary therefore to go to psychology to ascertain in what 'will' consists, and this investigation will not only discover 'will,' but at the same time separate it off from several other mental states. The reader who has a particular aversion to pure psychology is advised to pass on to the fifth paragraph of this chapter.

Perhaps the most fundamental thing in Will is the presence of an idea : we know of no definition of it which omits this, though it is also present equally in other states as, *e.g.*, Desire. The mere presence, however, of the idea is not sufficient, the idea must also be realized or at least attempted to be realized by the agent. Thus Green defined Will as "the action of an idea impelling to its realisation,"^(a) and Mr. Bradley, "Will is the self-realisation of an idea with which the self is identified,"^(b) and again "in volition we have an idea determining change in the self and so producing its own realisation."^(c) The latter writer does not allow that it is a complete act of will unless the idea is carried out into fact,^(d) and in order to do this the idea must be dominant : it is not the only element in the psychical state, but it is the one that makes the difference, and the important matter therefore is to ascertain the content of the idea, and whether and in what way the idea contributes or does not contribute to the result.^(e)

(a) T. H. Green, *Prolegomena*, § 152.

(b) *Mind N. S.*, No. 49, p. 1.

(c) *Appearance and Reality*, p. 115.

(d) *Mind N. S.*, No. 49, pp. 7, 19, 26.

(e) *Ibid.*, p. 3 and *N. S.* No. 44, p. 438, *et seq.*

He thus distinguishes 'Will' from 'Intention' and 'Resolve,'
 Intention and Will. because we can have such states as mere Intentions and mere Resolves which do not issue in action, though he allows that they can partake of the nature of an incomplete act of will.^(a) An accomplished intention is, however, a real volition. ✓ //

Now, as to the character of the idea in Will, Mr. Bradley explains that it may be unspecified and general :
 The idea in Will and Impulse. we may act on the idea of avoidance or injury without the idea of injuring or avoiding in some particular manner, and in the course of the act the idea's content will in its process further particularise itself : this is how he regards impulsive actions. In such cases we do will to injure in general or simply to strike, but probably not to strike in any particular way or with any particular weapon or with any special result, and in considering these acts " the true question here is about the actual content of the idea, what that was, how unspecified it was, and how far the individual result can be taken as its proper self-realisation."^(b) and (c) As many cases of murder are of this impulsive kind we wish to draw attention to the above remarks, especially as the law appears to attribute in such cases to the doer a frame of mind which is entirely opposed to that which really exists in him : if the possibility of acting without reference to particulars in the way described by Mr. Bradley be doubted, we may remark that the same has been stated in different languages by others. Thus, after speaking of the localization of images in the external world in hallucination and sensation and in the past in memory, the authors of Animal Magnetism go on to say "But these localizations in time and space are superadded acts, which are not essential and are often absent. We believe that it is the same with volition. The impulse is the fundamental fact, around which may be grouped the secondary states of consciousness which make the impulse a

(a) Mind N. S., No. 49, pp.447—8.

(c) *Ibid*, p. 463 note.

(b) *Ibid*, pp. 461-3.

voluntary or involuntary act, or which assigns to it a given motive. These are accessory or superadded phenomena, not integral parts of the occurrence.”(a) Similarly Professor Höffding says that the idea plays in impulse only the part of disposing the mind to move in a certain direction, as the idea of water in a thirsty person.(b)

Wundt also has distinguished between what he calls a simple volitional act or impulsive act and voluntary acts, (c) and an examination of this distinction will be useful in aiding the reader to grasp more fully the nature of the instinctive impulsive acts to which allusion is frequently made in this volume.

He approaches the matter from the side of the emotions, and says that in one class of these ‘the emotional process may pass into a sudden change in ideational and affective content, which brings the emotion to an instantaneous close; such changes in the sensational and affective state which are prepared for by an emotion and bring about its sudden end, are called volitional acts. The emotion together with its result is a volitional process volitional act is the name of only one part of the process, that part which distinguishes a volition from an emotion in mere emotions there is an entire absence of those changes in the train of ideas, which changes are the immediate causes of the momentary transformation of the emotions into volitions, and are also accompanied by characteristic feelings.(d) There is no feeling or emotion that does not in some way prepare for a volitional act or at least have some part in such a preparation. All feelings, even those of a relatively indifferent character, contain in some degree an effort towards or away from some end. This effort may be very general and aimed merely at the maintenance or removal of the present affective state.’(e)

(a) Binet and Féré, *Animal Magnetism*, p. 295.

(b) Höffding, *Outlines of Psychology*, p. 92.

(c) W. Wundt, *Outlines of Psychology*, p. 206.

(d) *Ibid.*, p. 201.

(e) *Ibid.*, p. 203.

Now it is a simple volition when there is a single motive that determines it, *i.e.*, a single feeling together with its accompanying idea, and the movement in which it terminates is an impulsive act. It is distinguished from a voluntary act by the fact that in the latter there is more than one motive: several feelings and ideas in the same emotion here tend to produce external action and when they tend at the same time towards different external ends, whether related or antagonistic, there arises a complex volitional process from which results a voluntary act.

With this may be compared Professor Stout quoted elsewhere, that voluntary action arises after a conflict, and it is only after such a conflict that we get the idea of decision, resolution, choice, etc. The absence of these antecedent feelings of resolution and decision, Wundt regards as the essential reason for distinguishing impulsive acts from complete volitional ones. (b) We have here then ~~one~~ ground for distinguishing impulsive acts from voluntary ones, *viz.*, that they spring from a single motive and are not preceded by a mental conflict. There is, however, another element in them which is also recognised by Wundt: "Another element," he says, "namely, the character of the feeling that acts as impelling force is, in popular thought, usually brought into the definition. All acts that are determined by *sense-feelings*, especially common feelings are generally called impulsive acts without regard to whether a single motive or a plurality of motives is operative." Although he declines to recognize this as a basis of discrimination, on the ground that it wrongly leads to a complete separation between impulsive acts and volitional acts as specifically distinct kinds of psychical processes, he nevertheless remarks: "To be sure; the earliest impulsive acts are those which come from sense-feeling. Thus most of the acts of animals are impulsive, but such impulsive acts appear continually in the case of man, partly as the results of simple sense emotions, partly as the products of the

(a) W. Wundt, *Outlines of Psychology*, pp. 205-206.

(b) *Ibid*, p. 208.

habitual execution of certain volitional acts which were originally determined by complex motives.”(a)

To a psychologist like Wundt who traces the stages up from pure emotions, through simple volitions to voluntary acts proper, there is, of course, no warrant for anywhere drawing a hard and fast distinction of kind between the mental processes which he here analyses; we, however, are seeking to distinguish these acts for a different purpose, and to us it is allowable to lay stress also on this second ground of distinction which Wundt admits is present in the popular idea of what constitutes an impulsive act, *viz.*, that they spring from sense-feelings. The meaning of this is simply that the single emotion has full play and the action is the result of an entirely, or at least a greatly preponderating, affective state, whereas in the voluntary act which is the result of different mutually inhibiting feelings the final state may be an apparently unemotional one.(b) It is this latter state of mind which is ordinarily referred to in such expressions as ‘premeditated,’ ‘malicious’ and even ‘intentional,’ and the plain man regards a crime committed as the outcome of such a mental state as in a different class from the one described as the impulsive act. Now the lawyers’ method of setting up a theory that knowledge and intention are the same thing, and that the knowledge can only be presumed from the results of actions, entirely abolishes the distinction between voluntary and impulsive acts against both the inclinations of the layman and the views of the psychologists which we have given above.

Desire.—When impulse is controlled by distinct ideas we have desire(c) which is not necessary for will, as Mr. Bradley holds: he describes it as a felt tension in the self(d), and so agrees with Wundt who says that it is not the uniform antecedent of will, but rather a process which only appears in consciousness when some inhibition of voluntary activity prevents the realisation of volition

(a) W. Wundt., *Outlines of Psychology*, pp. 205-6.

(b) *Ibid.*, p. 208.

(c) Höffding, *op cit.*, pp. 236, 322.

(d) Bradley, *Ethical Studies*, p. 239.

proper, and that though it may be present in the mind before a voluntary action occurs, it is not indispensable and often absent.(a) It may be that the feeling of desire is not always present, but what is aimed at in will is certainly always the object of desire, as will be clear when we come to speak of motives, and this is stated by Mr. Bradley himself in several passages;(b) the only possible exception would seem to be cases in which we act on instinctive impulse, and here if the impulse is entirely without any consciousness of end, it is hardly will.

2. The states known as Deliberation, Choice, Reflection, Purpose, Resolve, occur in the higher forms of will, and they usually imply a contest between conflicting impulses and ideas and an interval between the thought and its execution. The ideas excite the feelings and memory, and if the object of the impulse is adhered to it in spite of scruples, it becomes an aim, and we then speak of a purpose or intention to carry it out. It is only after a struggle of this kind that a man feels that he has acted according to his true self, *i.e.*, the permanent thoughts and feelings which have taken deepest root in him and this state of mind is usually called Resolve, which differs from purpose or intention, simply in degree. They are distinguished from mere impulse, as the latter knows but a single possibility, a single motive, while both they and will proper develop through the interaction or conflict of various motives.(c)

It will thus be seen that intention as understood in psychology is not a simple mental state but belongs to the higher forms of will, and an accomplished intention is both an act of will and an expression of the self. In what sense this latter phrase is used perhaps calls for further explanation. "In voluntary decision special conations and their ends are first considered in their relation to the total

(a) Wundt, *Human and Animal Psychology*, pp. 225, 229.

(b) Bradley, *Ethical Studies*, pp.

65-66, 139, 232, 239; *cf.* also Stout *Manual of Psychology*, p. 607.

(c) Höffding, *op cit.*, pp. 327-9

system of tendencies included in the conception of the self. . . . voluntary action does not follow either of the conflicting tendencies as such ; it follows our preference of the one to the other. It is the conception of the self as agent which makes the difference :'' (a) and again Ribot writes. " 'The 'I will ' testifies to a condition, but does not produce it The acts and movements which follow it (volition) result directly from the tendencies, feelings, images and ideas which have become co-ordinated in the form of a choice. It is from this group that all the efficacy comes.' '(b)

Dr. Stout finds the key of voluntary action, in the fact that it arises after internal conflict : the voluntary decision is the state of mind which emerges when the process of conflict ceases, because it has worked itself out to a definite conclusion, and equilibrium is restored, and he contrasts this with the action from a fixed idea, which realises itself through its mere isolated intensity.(c) Such conflict is only possible through the existence of the self, and although every intention may not be the outcome of such a contest many are, and all involve the conscious presentation of an idea to the self as the object to be carried out. Thus the same writer says : "Action is intentional so far as we have *ideal prevision of its course, the end to be attained, and its collateral consequences*. All actions due to voluntary decision are intentional. But the inverse is not true. Routine conduct may be intentional without involving any decision or resolution,"(d) as an instance of which he gives eating at regular meal times. He also quotes the case of the man who 'simply drifts into his actual course of action' : here there is no determination at all on the man's part involving a comparison of ends and a preference, but two impulses or tendencies compete now one, now the other prevailing. Apart from these two classes of cases he apparently considers that all intention involves volition, and as regards both these classes we should be inclined

(a) Stout, *op cit.*, pp. 601-2.

Vol. I, pp. 130-2.

(b) Ribot, *Diseases of the Will*, p. 133.

(d) Stout, *Groundwork of Psychology*, pp. 231-2.

(c) Stout, *Analytical Psychology*,

to say that in so far as the idea of the end is not present or attended to there is no real intentional act, but that when action does take place it necessarily involves attention to the end, unless it be of the instinctive, impulsive kind already described.

The importance of attention in will lies in the fact that we can augment the intensity of an excitation by attending to it, and voluntary movement takes place by directing attention to the idea of a movement. (a) Professor James' view is perhaps rather exaggerated, but deserves quoting as it illustrates what the effect of attention is: "Attention with effort is all that any case of volition implies. The essential achievement of the will, in short, when it is most 'voluntary,' is to attend to a difficult object and hold it fast before the mind. The so doing is the *fiat*; and it is a mere physiological incident that, when the object is thus attended to, immediately motor consequences should ensue"; and again, "effort of attention is thus the essential phenomenon of will," and "the difficulty lies in getting possession of the field. Though the spontaneous drift of thought is all the other way, the attention must be kept strained on that one object until at last it *grows*, so as to maintain itself before the mind with ease. This strain of attention is the fundamental act of the will, and the will's work is in most cases practically ended when the bare presence to our thought of the naturally unwelcome object has been secured. For the mysterious tie between the thought and the motor centres next comes into play and . . . the obedience of the bodily organs follows as a matter of course." (b)

As an important distinction will be drawn later between implicit knowledge and knowledge present in the mind at the time of action which appears to imply at all events some attention, it is necessary to exhibit here what the function of attention in voluntary action really is.

(2) Binet, Double Consciousness, p. 83; Sully, Outlines of Psychology, p. 35.

(b) W. James, Principles of Psychology, Vol. II, pp. 561-4.

Instinct is more complex, more active and more conscious than reflex movement, and consists of the union of a strong feeling with certain sensations and involuntary motor impulses: the consciousness, however, is not of the actual end of the action. (a) Though originally an instinctive act is performed without foresight of the end and without previous education, instincts are modified by experience, and then become less blind, at all events in the case of man, who has memories, associations, inferences and expectations. (b) Darwin explains instinct as inherited habit determined principally by the influence of the environment and the struggle for existence, but also to some slight extent by intelligence. This must complete for the present our sketch of the various mental states connected with will.

3. We must next explain 'Motive' and what it is that determines conduct. By 'motive' is usually meant an ulterior end, but what actually moves us is a felt contradiction, and a thought or idea moves us by exciting desire: desire therefore is the real stimulus. (c) It is the feeling excited by the idea of the end, or, as Wundt describes it, motives are internal causes of volition, and a motive is a particular idea with an affective tone attaching to it, and the combination of idea and feeling in motives only means that an idea becomes a motive as soon as it solicits the will, feeling itself being simply a definite voluntary tendency. (d) It will be well to dwell for a moment on the part played by desire. "Where, however," says Prof. Sully, "circumstances allow of a gratification of the desire, this passes into a new form, *viz.*, an impulse to carry out a particular line of action. A desire when thus transformed into an incentive or excitant to action is what we call a motive. A motive is thus a desire viewed in its relation to a particular represented action, to the carrying out which it

(a) Höffding, *op cit.*, pp. 91, 248, 312.

(d) Wundt, *Human and Animal*

(b) James, *op cit.*, Vol. II, pp. 383, 390. Psychology, p. 234.

(c) Bradley, *Eth. Stud.*, p. 233.

urges or prompts.”(a) Now desire does not always follow knowledge, but, on the contrary, “instances are by no means wanting of very imperious desires accomplished by the clear knowledge that their gratification will be positively distasteful,” (b) and it seems necessary to point this out in view of the accepted legal doctrine that intention is equivalent to knowledge, which will be examined later.

At the same time it must be observed that a motive is not something distinct from ourselves which moves us from the outside, but it is always the individual himself from a definite side: our motives are determined not only by our original nature but also by our earlier volitions and actions.(c) “Motives are not mere impulses,” says Prof. Stout, “they come before consciousness as reasons why I should act in this or that way.....the motives are motives only in so far as they arise from the nature of the self, and presuppose the conception of the self as a determining factor.”(d) The same idea is differently expressed by Wundt when he says that the uncertainty of the connection of motive and volition is due, and due only, to the existence of the personal factor, and that the direct effect of a motive is on personality.(e)

We may now divide actions into two classes—a distinction on which much stress will be laid later—according as acts are done with or without a motive. This classification is made by Mr. Bradley as follows:—“(1) Everybody knows that there are actions which we say we do without a motive: there are acts in the first place, not preceded even by the (conscious) idea of the act to be done; and in the second place (and these latter are more important), there are acts which are done thinkingly and on purpose and which yet are done without any ulterior intent beyond the

(a) Sully, *op cit.*, p. 392.

(b) J. Ward, Art. Psychology, *Encyclopædia Britannica*, 9th Edn., vol. xx. p. 74.

(c) Höffding, *op cit.*, p. 345.

(d) Stout, *Manual of Psychology*, p. 605.

(e) Wundt, *op cit.*, p. 433

act itself ; and here for our minds there is no ‘ because’, we do what we want, and it is simply a mistake to suppose that in and for our minds there is another and a further end represented, which suggests the act or to which the act is a means. (2) And where we act, as we say *with* a motive, where we have in our minds a reason, an aim, an object beyond the act, which the act subserves, there these motives, these thoughts of ends or objects to be realized, are of very different kinds. The motive to the act may be the thought of another particular act, or of the whole of a complex scheme ; it may be the idea of an end which my action is to bring about, the pleasure or the happiness, the pain or the ruin of another ; in a word the idea of any event, the thought of whose realization by certain means excites desire or want, and so is a motive.” (a)

This division then is into actions on instinctive impulse and actions on conscious desire for this or that either with or without the idea of an ulterior end (b) and we contend that the “ intention ” in the doer is different in each case, and the same intention should not be attributed to him merely because the results are the same as the law at present does. It is in murder cases in particular that the point is important, and we shall therefore enforce the existence of the first class of acts by another quotation : “ Nevertheless all the authors whose works I have consulted,” said Darwin “ with a few exceptions, write as if there must be a distinct motive for every action, and that this must be associated with some pleasure or displeasure. But man seems often to act impulsively, that is from instinct of long habit, without any consciousness of pleasure, in the same manner as does probably a bee or ant when it blindly follows its instincts. Under circumstances of extreme peril, as during a fire, when a man endeavours to save a fellow creature without a moment’s hesitation, he can hardly feel pleasure ; and still less has he time to reflect on the dissatisfaction which he might subsequently experience, if he did not make the attempt. Should

(a) Bradley, *op cit.*, p. 230.

(b) *Ibid*, p. 232.

he afterwards reflect over his conduct, he would feel that there lies within him an impulsive power widely different from a search after pleasure or happiness; and this seems to be the deeply planted social instinct.”(a) Speaking of such actions Wundt says that the majority of the acts of animals are impulsive and also human actions in the earlier stages of development.(b)

Finally the writers are unanimous to the effect that what determines conduct, voluntary and impulsive alike, is not intellect or ideation, but feeling and that although in will there is an ideational element it is through feeling that it influences action. Thus Ribot quotes with approval the saying of Spinoza that “appetite is the very essence of man..... Desire is appetite with consciousness of self From this it results, that the foundation of effort, volition, appetite and desire, is not the fact that a person has adjudged a thing to be good; but on the contrary, a person deems a thing good because he tends towards it from effort, will, appetite and desire.”(c)

Similarly Prof. Höfding: “Everything which is really to have power over us, must manifest itself as emotion or passion. Mere ‘reason’ has no power in actual mental life, where the struggle is always between feelings. The frequent talk of the conflict of reason with the passions is consequently psychologically incorrect. No such conflict can take place directly. A thought can suppress a feeling only by exciting another feeling which is in a position to set aside the first.”(d)

So also Prof. James says “there is no material antagonism between instinct and reason. Reason, *per se*, can inhibit no impulses, the only thing that can neutralize an impulse is an impulse the other way. Reason may, however, make an inference which will excite the imagination so as to set loose the impulse the other way,”(e) and Wundt is very explicit to the same effect: “But

(a) Darwin, *Descent of Man*, vol. i, p. 184, Note.

(b) Wundt, *op cit.*, p. 232.

(c) Ribot on Attention, p. 107.

(d) Höfding, *op cit.*, p. 284.

(e) James, *op cit.*, Vol. II, p. 393.

motives are always accompanied by feelings and the feelings further appear to us as those elements of the motive which contain the real reason of the activity. Without the excitation which feeling furnishes, we should never will anything. A mind which contemplated things with entire indifference as 'pure intelligence' could never possibly be roused by them to volition or action. Feeling therefore presupposes will and will feeling;" and again "it remains completely unintelligible how a decision of will can arise purely from intellectual processes. Introspection invariably points to feeling as the antecedent of will; but feeling, as we saw above, is not separable from it, since it always implies a certain tendency to will in one way or the other."(*a*)

That conduct is guided really by emotion and not by knowledge or understanding, and that intellect is not a power but an instrument which is moved and worked by forces behind it, *viz.*, the passions, is insisted on by Herbert Spencer, who concludes that it is only by awakening appropriate emotions that character can be changed. (*b*)

4. The object of demonstrating the importance of feeling in determining action is in order to render it plain that any doctrine which accounts for action merely by knowledge is psychologically false. At the same time we must not be taken to deny any influence to the intellectual factor in will: in addition to the power of ideas to excite the feelings, it is by means of the intellect that man imaginatively moves into the future and forecasts events. Intellect also multiplies occasions for desire, and includes in the mental forecast undesirable as well as desirable results of action: hence the opposition of impulses. (*c*) But this arises in the higher or reflective stage where the interval before action is prolonged, and specially where we have general aims, *e.g.*, health, thrift, etc., leading to consistent courses of action. We

Influence of the intellectual factor.

(*a*) Wundt, *op cit.*, pp. 224, 228.

pp. 170, 172-3.

b) Herbert Spencer, *Social Statics*,

(*c*) Sully, *op cit.*, pp. 410-1, 413.

doubt, however, whether it has any influence in the instinctive impulsive actions described above.

Here we must notice the argument that self-consciousness is not necessary for will, for though responsibility begins with self-conscious volition, we afterwards become answerable for acts of will not self-conscious, because now we know their character and ought to have them under control. In most of our actions we act from habit and without reflection: habits are all important and these need not be self-conscious, yet we are responsible for them because what makes the habit is within the region of conscious volition. The habits we encourage or suffer, we are aware of or might be aware of: we know their moral quality and hence are responsible for them. Our character formed by habit is the present state of our will, and though we may not be fully aware of its nature yet morally it makes us what we are. Our will is not this, that, or the other conscious volition, nor does it exist just so far as we reflect upon it. It is a formed habit of willing.^(a)

Similarly Professor Sully says: "The final decision after deliberation, if a rational and good one, does not need to be arrived at again and again in all similar cases. A particular exertion of self-control, say the quelling of a feeling of annoyance . . . which in the first instance was the outcome of a process of reflection, will, in succeeding cases, be shortened or compressed into control without such preliminary reflection. Here we may see that the process of self-control is becoming habitual in a new sense. Certain motives are acquiring a fixed place in the mind as ruling forces, organically connected with appropriate actions, while other and lower forces are losing ground."^(b) /

As a question of moral philosophy we do not dispute this theory of moral responsibility, though we must point out that the latter writer admits a certain limitation to it, *viz.*, that the habitual, that is the relatively unconscious and mechanical, comes in only so far

(a) Bradley, *Eth. Stud.*, pp. 218-9.

(b) Sully, *op cit.*, p. 438.

as features and situations of the environment recur in perfectly like form, and so require similar modes of re-action. Now, while it is true that the external conditions of human life, physical and social, are so far recurrent that our actions may be organised into a certain number of persistent forms or types of conduct, as thrift, temperance, fulfilment of promise and the like, they are not so uniform in their actual, concrete combinations as to allow of our particular actions becoming in the complete sense habitual. Again, there is a limit of another kind due to the strength of feeling which the same writer describes : " Thus there is a state of lethargy, or depression of active energy, out of which even the most powerful motive may fail to rouse the subject. At the other extreme there is a strength of instinctive or 'organic' impulse which no ideational motive can overcome . . . no moral or other consideration will hold back a man from slaking his thirst when the appetite reaches a certain intensity." (a) To fail to take account of this is to overlook the limits of human powers. But we are not maintaining a thesis that the man who acts on instinctive impulse is not at all responsible for his acts, but that where the law prescribes that in order to be guilty of a special offence he must be shown to have acted with a special intention, such intention in his case does not exist and should not be presumed, merely on the ground of knowledge, much less on the ground not of his knowledge but of the knowledge of the average man, whoever this phantom may be.

The kind of cases we have in mind are those in which the agent acts under the influence of some strong emotion, especially anger, during which the state of his mind is practically blindness or blankness of ideas, as, *e.g.*, is described in Professor Stout's Analysis of Anger. (b) There is merely a general impulse to crush and destroy or to vent itself on something, by preference on the cause of irritation, but not necessarily so ; just as ants, when

(a) Sully, pp. 440-1 ; p. 436.

(b) Stout, Manual of Psychology, pp. 319-323.

corrosive sublimate is sprinkled on their paths, in their blind rage attack one another.

5. The reader who has persevered is probably by this time weary of psychology and will welcome some application of it to law. The first legal doctrine that we shall examine may be described briefly as 'the knowledge equals intention theory': this is further united with a second theory that 'every person must be taken to intend the natural consequences of his acts',^(a) and so in its complete form we get the doctrine constructed as in the following quotations: "It is not, however, to be supposed that direct evidence of the prisoner's mental condition is necessary. The circumstances which prove the act will in general prove the knowledge or intention. It is a fair presumption that every man knows the probable result of the act which he does, and if he knows the result, then it is an equally fair inference that he intends it, *i.e.*, that in doing the act he contemplates that it will lead to that particular result (*R. v. Pooshoo*, 4 *Suth. Cr.* 33 : *s.c.* 1 *Wym.*, *Cr.* 9)."^(b)

Again the same author says: "Section 86 lays down no rule as to the inference of intent in cases of intoxication. A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should. As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention; since, assuming, the knowledge, the law will allow no other explanation of the act to be given."^(c)

As to what are 'natural, probable or necessary consequences' of an act, the only method of deciding laid down by the legal

(a) *Best on Evidence*, § 344.

(b) *J. D. Mayne Commentaries on the Indian Penal Code*, 13th Ed., p. 262.

(c) *J. D. Mayne, Commentaries on the Indian Penal Code*, 13th Ed., p. 78.

text-books that we know of, is with reference to civil liability, though used apparently in criminal cases, (a) *viz.*, that those consequences only are natural and probable which a person of average competence and knowledge being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. (b) The method, therefore, is by reference to the capacities of a normal or standard man.

Our objections to the theory are that it is built upon assumptions and no other basis, and that these assumptions are in fact false and opposed to the teaching of psychology: further that it is a *petitio principii* and unfair to the accused, it is not consistently applied, and the part of it which concerns the decision of what is natural and probable is impossible of application.

The first assumption is that you can know the probable, and to this we demur: such an assumption appears to involve ignorance both of the sphere of knowledge and of the meaning of probability. “It would appear,” says the late Professor Robert Adamson, “that knowledge extends to facts immediately present in consciousness, and to certain relations true of all facts of sensible experience; but in neither of these classes of cognition does there seem to be given an absolute guarantee for the *existence* of any fact which is not immediately before us.” (c) We can also know all propositions of apodeictic certainty such as those of mathematics, but the probable is the subject of belief, conjecture, opinion, and similar states of mind. A probable conclusion is held only with a certain degree of conviction just because we have not full grounds of knowledge but only partial grounds, and the degree of certainty we have varies with our past experience of the

(a) *Q.-E. v. Nana*, 1 L. R., 14 Bom., 260, 267.

(b) Pollock on Torts, 6th Edn., pp. 30-1.

(c) R. Adamson, Art. ‘Belief’, Encyclopædia Britannica, 9th Edn., Vol. 111, p. 532.

frequency of an occurrence or our information about it.(a) For further remarks on this point, reference must be made to the chapter on Belief.

Now, we do not wish to insist unduly on the psychological meaning of these terms, but we would suggest that if the assumption that 'every one knows the probable result of the act which he does' be translated into 'everyone can have a belief as to what may be the result of his act',—which is all that we are warranted in saying—we should less readily go on to draw the second presumption that he did therefore necessarily intend the result. The error of supposing that a man knows the probable result is doubtless due to the common fallacy of reading into the agent's mind what we feel ourselves after the event: for we are then dealing with the past, not the future, and so have knowledge about it, but the case was different with the actor whose state of mind was quite unlike ours, and it is extremely difficult for us to grasp what his belief—let alone his knowledge—would have been under the circumstances. His own statements on such a point are really the most valuable information we can get, but it is the practice of the lawyers to reject them and rely instead on what a so-called average man would have known or believed in like circumstances, and some even go so far as to say that it is immaterial what the man himself actually believed or intended.

Knowledge and Intention. The second assumption is that if a man knew the probable results, he must therefore have intended them, which is equivalent to saying that knowledge and intention are the same thing. The purpose of our psychological analysis of 'Will', 'Intention' and other mental states in the earlier part of this chapter was to show that intention belonged to the higher forms of will: that it always involved the presence of an idea in the mind and an expression of the self: and that it is feeling and not intellect or knowledge that determines action. Desire, we

(a) L. T. Hobhouse, *Theory of Knowledge*, p. 292 *et seq.*

showed, was the great stimulus to act, and desire and knowledge are often opposed: indeed though the writers lay stress on impulse, desire, the idea of the end, and attention in will, none lays stress on knowledge as such, and all agree that a purely intellectual state would not produce action.

We cannot refrain from briefly quoting here some further opinions on this point. "Man acts *before* he theorizes," says Professor Höffding: (a) and again "An activity of thought entirely free from feeling . . . does not exist. It is because of the movements of feeling accompanying all ideas and thoughts, that knowledge becomes a power in the mind," (b) and again "the close relation between feeling and will appears from the fact that only a strong and lively feeling serves as a motive to the will. Cognitive elements do not in themselves lead to voluntary movement." (c)

We, therefore, on psychological grounds, protest when the lawyers single out knowledge, and explain action by it entirely, to the complete exclusion of feeling. This they are only able to do by identifying it with intention, on the strength of an assumption which is false according to all the psychological evidence, and they thus simply neglect the mainspring of action and attribute to the doer a condition of mind which he never has.

We have further to object that they ignore the difference between knowledge being present merely and being active in intention, a distinction which is recognised elsewhere, even in law. Thus speaking of acquiescence it is said: "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. And the knowledge must be actual not merely possible or potential." (d) Measuring the knowledge as they do by the results of the action, they infer that a knowledge equivalent to such results must have been necessarily employed at the outset of the act. Now, even if the knowledge assumed is at any time implicit in the agent, it may well be that it was not present to him and

(a) Höffding, *op cit.*, p. 2.

(b) *Ibid*, p. 95.

(c) *Ibid*, p. 99.

(d) Pollock, *Principles of Contract*, p. 591.

utilised by him at the time he acted, and we have no hesitation in asserting that such must be the case in actions done on instinctive impulse, such as we have already alluded to, as *e.g.*, in moments of blind rage when the mind is practically blank or without any but the most general idea. To be implicit is not enough: "what is apprehended implicitly is never for consciousness the same as what is apprehended explicitly." (a)

That the state of mind in which anger predominates is not one in which the idea of consequences, the future, &c., can be present is plain from the nature of emotion. It is clear that such states are ones in which emotion either has complete sway or at all events prevails over any intellectual state. In anger the primary element is emotional, *i.e.*, an emotional tendency going in the direction of impulsive movement, an instinctive unconscious movement. On the other hand images, ideas and intellectual states of all sorts act by way of arrest so that the resultant emotion is composed at the same time of movements and inhibition of movements. In the states we allude to the acts and the immediateness of them show that the intellectual state is absent, but this is just what the law assumes is there. (b)

6. The method of judging intentions purely by results even though you insert the qualification 'natural' and 'probable,' is a radically bad one: in moral philosophy they are opposed to one another as separate criteria of conduct, and the Utilitarians have long been condemned for their exclusive attention to results. In law the same method has been pursued, but through the astounding use of knowledge as a link they have in the end been positively identified, or at least used as identical, to the complete disregard of actual facts. It puts on a level acts that are not really the same merely because they have resulted similarly: if you look only to

(a) Stout, *Groundwork of Psychology*, p. 134: for more on this subject, see *alsopp*. 134, *et seq.* where it is

treated from the side of attention.

(b) Ribot, *the Psychology of the Emotions*, pp. 265-6.

the consequences, it then follows that if bad actions produce good consequences they are not to be restrained, which is merely the Jesuit doctrine that the end justifies the means turned inside out. (a) We are aware that law does not profess to follow the rules of moral philosophy, but we doubt whether our legislators would be content to admit that they have simply accepted the Jesuit maxim as their criterion of conduct where intention is concerned. Of course, the reply will be, but how else can you estimate intention? In fact, it may be given in Sir Frederick Pollock's words: "The wrong-doer cannot call on us to perform a nice discrimination of that which is willed by him from that which is only consequential on the strictly wilful wrong. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay more it would in the majority of cases make no difference if the wrong-doer could disprove it. Such an explanation as this, "I did mean to knock you down, but I meant you not to fall into the ditch," would, even if believed, be the lamest of apologies, and would no less be a vain excuse in law." (b)

Now, it seems to us that the difficulty of ascertaining the truth is no reason for inventing an artificial system which does not apply to the facts but gives false results and works injustice to the accused: if, however, others disagree with us as to this, let them at least be honest and admit that their system is one of make-belief which does not profess to deal with the real facts, with real men and real human conduct and real intentions, and let them simply plead that they can do no better owing to the difficulty of the circumstances and must therefore ask us to accept fiction for fact. But this is not their attitude: they profess to prove when they merely assume, or presume, which comes in this case to the same thing; they speak of their presumptions as 'fair' ones, and they assert that they deal

(a) Cf. an article on Sir Leslie 23rd, 1904.
Stephen in the *Standard* of February

(b) Pollock on Torts, p. 34.

with daily life, and hence there is no hope that they may be led to adopt better ideas. The point is, says Mr. Bradley, what is before the mind in the act? (a) They do not even look at the mind. 'Is the end only before the mind with blindness to the possible result; or is that result considered?' (b) "There is a difference between the mere foreseeing that in fact the effect will follow, and contemplating that effect and setting it before me as my end." (c) They say, there is no difference: we will not even look at the end but only at the result and treat all cases alike.

In intention there is direction towards an end, in knowledge there is not: they say knowledge and intention are the same thing. What we desire must be in our minds, we must think of it. Intention must imply that we mean it, have it in our minds. An act supposes that what was in the mind was carried out. (d) They say it does not matter what the individual means or desires, we look to what seems probable to the average man, and they further look at it *post factum*. If we are to decide whether an instinctive act is in any case a volition we have to enquire first if it is the result of a foregoing idea, and in the second place, if that idea is found, and the action is therefore will, we have next to ask 'what precisely is contained in the idea.' They say we are not concerned with ideas and their contents, but with results of acts only.

Psychology shows that action is determined primarily, and always to some extent, by feeling and never by the intellect alone. They neglect feeling entirely and profess to explain actions rightly by knowledge alone. In short, they do not attempt to answer a single question of those which must be answered in order to discover intention, but substitute instead something altogether different and thus we maintain are not dealing with reality.

We further assert that their method of procedure, stripped of its legal jargon, is nothing but a naked *petitio principii*. It is the duty of the prosecution in a criminal case to prove the offence,

The theory really a
petitio principii.

(a) Bradley, *Eth. Stud.*, pp. 256, 277.

(b) *Mind*, N. S. 46, p. 159.

(c) Bradley, *Eth. Stud.*, pp. 75—76.

(d) *Mind*, N. S. 49, p. 3.

i.e., both the fact of the deed and the intention with which it was done ; they merely prove the fact, and then say that the intention must be presumed from it. Now, we do not wish to be misunderstood on this point : it is not our desire to assert that the intention either ought to or can be proved by the same kind of evidence as that by which the fact is proved, inference must be employed. If, however, you are going to infer knowledge, it must be from the party's means of knowledge at the time, including his state of mind as far as the witnesses observed and can testify to it and the circumstances suggest ; to assume that his knowledge was either the same as your own or that of the average man—if you really can frame any conception of such a person—and to further assume that such knowledge is equivalent to intention, appears to us to be merely begging the question twice over, and in the latter case to be doing it against the psychological evidence.

To presume dishonesty generally from the unexplained possession of stolen goods is a different matter from presuming a special intention of the kind that it is necessary to prove in order to find a man guilty of murder under the Indian Criminal Law, and we believe that by means of the aforesaid *petitio principii*, this is not only frequently but also sometimes wrongly done. Indeed authority can be quoted in support of our view so far as special intention is concerned. “But where a specific intent is required to make an act an offence, the doing of the act does not raise a presumption that it was done with the specific intent.”^(a) This principle, however, is, we believe, not carried out, or at least is evaded by throwing the burden of proof on the accused. Thus it is said : “ So a party who is proved to have killed another is presumed in the first instance to have done it maliciously, or at least unjustifiably ; and consequently all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him.”^(b)

(a) Lawson on Presumptive Evidence, 499, Rule 97.

(b) Best on Evidence, § 433 : Taylor on Evidence, § 118.

7. The unfairness of the doctrine to the accused consists in attributing to him a state of mind which Unfairness of the doctrine to the accused. never existed in him, at all events in some cases, and making no effort to find out what his real mental condition was at the time of the act. In their efforts to establish a kind of mechanical certainty in the realm of mental law, our lawyers have attempted to bring qualitative diversities of individuals within the range of quantitative description, by assuming that so much results equals so much intention, all intention being alike in kind.¹ The fact that all mental states are not alike, they have got over by identifying intention with knowledge, of which they are only acquainted with one type. They have then lost sight of the fact that the result is merely a hypothesis which the legal mind has elaborated in order to render the facts conceptually manageable, and treating it as a reality have vainly striven to force it to apply in every case that arises, ignoring all individual differences. It is like requiring all men to fit a coat of one size and not the coat to fit the man, and owing to this demand the delinquent is often found guilty of a greater crime than would otherwise be imputed to him. We are speaking particularly of the impulsive instinctive type of action. If the man really did put before him in idea all the natural results of his act, he often would not commit it : it is just because he has not done so, but acts without an idea of the real consequences before him, on mere impulse, that he loses what would otherwise deter him, and does in fact commit the deed. Yet you credit him with just that exercise of knowledge which he has not had, with having done what he has not done, and punish him accordingly.

We have elsewhere described what we conceive to be the state of mind of a man under the influence of a strong emotion, such as anger : it is rather that of blankness than knowledge, and further as a mere question of time we doubt the possibility sometimes of cramming into the interval between the occurrence of the impulse and the act, the knowledge contained in the lawyer's presumptions. The importance of attention in will has been already referred to,

and voluntary attention to the consequences is equally required for intention: this demands a certain interval. According to Büchner, "Various ingenious experiments have proved that the swiftest thought that we are able to evolve occupies at least the eighth or tenth part of a second," (a) and psychology has made attempts to measure the velocity of thought by experiments with 'reaction times,' 'discrimination times,' &c., (b) but the results are not sufficiently certain to justify their application here, and no exact statements will therefore be hazarded as to the rate of mental pace. It may, however, be safely asserted that the process of foreseeing results is a complex one in which the judgment has to be used and inferences made from past experience.

It is a further objection to the doctrine that although the knowledge of all men is not equal, it clearly matters nothing what any one actually does know: for, without any reference to that, a ready-made knowledge is assigned him, and whatever his education or opportunities or experience may have been, all that is deemed irrelevant, even if he could prove them. For what is considered is not the knowledge of the agent but the knowledge of the average man, and if the individual does not happen to come up to the average, so much the worse for him. At least this is the theory; for we do not ourselves believe in the existence of this normal man in any shape or form, nor do we think that even if he could be imagined, he

Part of it in fact
inapplicable to par-
ticular cases.

could be successfully employed as a standard in any particular instance. The reasons for this view are set out in the chapter on "the normal man," and therefore we shall merely cite here the conclusions arrived at there, which are as follows:—That the person of average knowledge has no existence, and such a conception is impossible of application to particular cases: the standard is really a sham, and the person who professes to apply it in fact substitutes himself for the supposed normal man: if it could be applied at

(a) Force and Matter, New York, 1891, p. 241.

op. cit., Vol. I, pp. 85 *et seq.*, 427-484, 526-7: Wundt, *op. cit.*, pp. 268-81.

(b) See Höfding, *op. cit.*, p. 94, James,

all, it would have to be so frequently varied and altered that it would no longer deserve the name of a general or universal standard.

8. Finally we desire to show that the doctrine is not consistently applied and is not in fact laid down in the law itself, the language of which is rather at variance with it.

The doctrine is not consistently applied.

Speaking of False Imprisonment cases, and discussing what is reasonable cause of suspicion to justify arrest, Sir Frederick Pollock says: "It is obvious also, that the existence or non-existence of reasonable cause must be judged not by the event, but by the party's means of knowledge at the time." (a) Yet this is really nothing but a question of intention, for the only reason why you wish to discover whether there was reasonable cause for the accusation is in order to decide what the intention of the complainant was in the matter. If, therefore, this is the right method to employ here, why not also in other cases where the intention has to be decided, as *e.g.*, in those of murder?

Again, the same author admits the difficulty to which we have already alluded, in the following words: "That which appears the best way to a court, examining afterwards at leisure and with full knowledge is not necessarily obvious even to a prudent and skilful man on a sudden alarm: "(b) Is not this a caution against the present method of coming to a conclusion as to what would appear natural and probable under the circumstances, in order to impute knowledge of it to the agent? Surely you do not imagine that you, in cold blood, represent the agent's real mood at the time, or can construct an average person to share such feelings!

That intention and knowledge are not the same appears to be admitted in the case of *Q.-E. v. Tulsha*, where a woman administered *datura* to three members of her family, and it was held 'that she must be presumed to have known that the administration of *datura* was likely to cause death, though she might not have

(a) Pollock on Torts, p. 221.

(b) *Ibid*, p. 460.

administered it with that intention.’ (a) This appears equivalent to saying that though she had not the intention she must be presumed to have had it because she had the knowledge, or at the very least involves a deliberate presumption against admitted probability. Considerable distrust of the doctrine is further shewn in the following passage by the same authors: “The reasoning should be not: ‘all acts of a certain class have a specific intent, and this act being of that class consequently has such intent’; but ‘the circumstances of the case make it probable that the act was done intentionally or maliciously.’ The process is one of inference from fact not of predetermination by law.” (b)

Again, in a well-known case Sir Barnes Peacock said: “From the fact of a man’s doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.” (c)

Referring it would seem to false representations it is said: “Generally speaking it is often said that a man is presumed to know the truth in regard to facts within his own special means of knowledge. More definitely the rule has been thus stated; what a person is bound to know has regard to his particular means of knowledge and to the nature of the representation, and is then subject to the test of the knowledge which a man paying that attention which every man owes to his neighbour in making a representation would have acquired in the particular case by the use of such means.” (d) Compare this with the following

(a) *Q.-E. v. Tulsha*, I. L. R., 20 All., 143, as quoted on page 804 of Ameer Ali and Woodroffe’s 2nd Edn. of the Indian Evidence Act.

(b) *Ibid*, p. 805.

(c) *Reg. v. Gora Chand Gope*, B. L. R., Sup. Vol., 443.

(d) Ameer Ali and Woodroffe, *op. cit.*, p. 807.

relating to estoppel "so also is it immaterial to know what the motive or the state of knowledge is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of the party estopped, but the effect of his representation or conduct, &c." (a) We do not say that a lawyer could not reconcile these passages,—though for ourselves we should not like to have to do it, but we do say that if, in order to presume knowledge, it has to be ascertained what are the special means of knowledge of the individual, this is a different method from neglecting the individual altogether and looking merely to what would seem probable to an average man under such circumstances.

That some judges have felt there is really something wrong in the doctrine we are criticising^z seems to us to be shown by their anxiety to avoid its effects. It is clear, and indeed this is expressly stated by the court in more than one case, (b) that according to the Indian Criminal Law a capital sentence is the usual penalty for murder, and in order to reduce it mitigating circumstances should be shown: in spite, however, of this, one Judicial Commissioner actually laid it down that a capital sentence is not called for when the offence is brought merely under the fourth paragraph of s. 300 of the Indian Penal Code (which defines murder). (c)

Again another Judicial Commissioner sets out a number of circumstances under which, though the offence was murder, a capital sentence should not be passed, *viz.*, when the offender was under 18 years of age, when there was no intention to commit murder, the offence falling under the fourth clause of s. 300 of the Indian Penal Code, when the murder, though intentional, was committed without premeditation, and in the heat of passion, without special

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 833.

(b) Printed Judgments, Lower Burma, p. 550, Burma Rulings, p. 216.

(c) Selected Judgments of the Court of the Judicial Commissioner of Lower Burma and the Special Court, p. 459. (*Nga Po Aung v. Q.B.*)

brutality, when there was grave provocation, but the provocation was not also sudden so as to reduce the offence to culpable homicide, when there was reasonable doubt as to the sanity of the offender at the time of the murder though actual insanity was not proved, and where the offender acted under the instigation of another and did not take a principal part in committing the murder.(a)

This advice has subsequently been dissented from by the Chief Court of Lower Burma.(b)

Similar efforts have been made in another form, *viz.*, by holding that wounds of a certain depth made by stabbing instruments would not under ordinary circumstances cause death, the facts being painfully strained to evade the legitimate conclusions of the doctrine in question,(c) some of which decisions have again been expressly overruled in later cases.(d)

Personally we confess to much sympathy with these wrong attempts to secure a right object, but the authors of them failed to see that the fault was really in the interpretation of 'intention' given by Mr. Mayne and similar writers, and later judges acting still under their baneful influence employed their legal logic to overrule the earlier decisions, and so have produced the present state of contradiction in the law, which is little short of a scandal.

The doctrine inconsistent with the language of the law. 9. Next it will be shown from the language of the law itself, that it is not altogether consistent with this doctrine.

The following is the illustration to s. 113 of the Indian Penal Code relating to abetment:—"A instigates B to cause grievous hurt to Z. B in consequence of the instigation causes grievous hurt to Z. Z dies in consequence. Here *if A knew that the grievous hurt abetted was likely to cause death*, A is liable to be punished with the punishment provided for murder."

(a) Printed Judgments, Lower Burma, p. 114 (*Moung U & Ors. v. Q. E.*)

(b) Lower Burma Rulings, p. 216. (*Crown v. Nga Tha Sin.*)

(c) *Mi Ni v. Q.-E.*, S. J., L. B., p.

300: *ibid*, p. 508 (*Q.-E. v. Nga Po Thet*) and especially the remarks in *Nga San Ya v. Q.-E.*, *ibid*, p. 463.

(d) L. B. Rulings, p. 63, *Hamid v. K.-E.*

Now, we submit that according to the doctrine we are attacking, the illustration ought to have run : ‘ Here, if death was a likely result of the grievous hurt abetted, &c.,’ without any reference to A’s knowledge on the point, whereas it specially makes A’s actual knowledge the test. Mr. Mayne himself seems to have found this rather difficult to reconcile with his view ; for he writes : “ Section 113 may lead to dangerous laxity unless the proper interpretation is put upon the concluding proviso”, he then dogmatically re-asserts his own doctrine as the proper interpretation and continues, “ Take for instance the illustration in the text. If the grievous hurt instigated by A were the maiming of Z, under the effects of which he died, no court of justice could allow A to plead ignorance of this probability as rendering his offence less than murder (Alison’s *Crim. L.*, 3). As Lord Justice Clerk laid down the law in one case in Scotland (Alison’s *Crim. L.*, 4) :—‘ this was an instance of absolute recklessness and utter indifference about the life of the sufferer ; and the law knows no difference between the guilt of such a case and that of an intention to destroy. ’”(a) We are here concerned with the definition of murder in English law, though the soundness of the pronouncement in question seems open to doubt even with regard to the interpretation of ‘ malice aforethought,’ but we can see nothing in the Indian Criminal Law to prevent A pleading what Mr. Mayne’s doctrine will not allow him to do, and we therefore say that the doctrine is inconsistent with the law.

But further, if as a fact knowledge is equal to intention, or even if it is to be taken to be so in law regardless of facts, it appears to us that the Legislature must be held to persistently make use of otiose and superfluous expressions.

Take first, *e.g.*, the definition of culpable homicide, s. 299, Indian Penal Code : “Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

(a) Mayne, *op. cit.*, pp. 112-3.

Now, if the doctrine that a man must be taken to know the natural results of his acts, and if he knows them he must be presumed to have intended them, is correct, the words in the above definition "with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or" are mere surplusage; for had the definition run "whoever causes death by doing an act with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide" it would, according to the interpretation of the doctrine, have also included the other cases mentioned in the definition. Indeed, it was unnecessary to have enacted even so much as this, for, without in the least straining the doctrine in question, it would have attained exactly the same results if the section had simply said "Whoever causes death by an act likely to cause death, commits the offence of culpable homicide." The reasoning is certain and automatic and we can exemplify in a few words: the act was likely to cause death, hence death was the natural and probable result: everyone is presumed to know the natural and probable results of his act, and if to know them therefore to intend them: the accused therefore intended them, and *hey presto* the trick is done and the man guilty of murder! Could anyone desire greater simplicity than this in our law? But the use in the definition of the expression 'or' twice over indicates that the legislature intended to distinguish between the three cases there described, and therefore it must have intended to distinguish 'knowledge' from 'intention,' and not to regard them as the same thing, as the lawyer's presumption does.


Similarly, with the definition of defamation in the same code, "Whoever by words either spoken or intended to be read, or by signs or by visible representations makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe, that such imputation will harm the reputation of such person, &c.," and again with the definition of 'voluntarily' s. 39, Indian Penal Code, where the same expressions are

used. In both these cases if knowledge and intention were for law the same thing, it would be unnecessary to expressly include both kinds of mental states in the definition.

It might also be added that, if the theory were really correct and consistently applied, it would be equally unnecessary to have a special section (s. 86, Indian Penal Code) providing that "a person who does an act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated." For clearly if intention is to be judged by results, as the doctrine holds, and every one is to be presumed to know and therefore to intend the natural and probable results of his act, why is it more difficult to presume this in the case of a drunken than of a sober man? For the doctrine plainly teaches that it is immaterial what the individual's actual knowledge is, and to use Mr. Mayne's own words: "The law assumes that a man knows and contemplates the natural result of his acts, and will not permit him to escape the consequence of his acts by merely pleading ignorance." (a)

Either then the doctrine is not of general application, as the lawyers assume, or else if it is the law abounds with otiose expressions, and further the Legislature has accomplished at least one work of supererogation in framing a section to provide for intention in intoxicated persons. Thus this master-presumption appears to have overreached itself and clashed with the law it affects to interpret.

(a) Mayne, op. cit., p. 112.



CHAPTER III.

INTENTION—(Contd.)

SIR JAMES STEPHEN'S use of the terms 'will' and 'intention' criticised—Examples of Intention in a murder case as presumed under the doctrine discussed in the last chapter—Example of the result in a kidnapping case of presuming that a man must intend the legal consequences of his act—Intention in estoppel—Negligence and intention—meaning of 'Wilfully'—Intention in fraud—Intention in cases of merger—Use of motive in law—Motive and Intention—Motive and Cause—Will in voluntary confessions—Consent—Meaning of 'forcing the will'—Criterion of 'voluntary decision'—Intention in the English law of libel—Various meanings of 'malice' and resulting confusion—Intention in the Indian Law of Defamation—'Implied intention,' 'express intention' and 'primary intention'—Similar confusion caused by such expressions which are in fact reproductions of the doctrine of malice in English law.

1. IN his general view of the Criminal Law of England Sir James Stephen has distinguished at some length certain psychological states, including Will and Intention, in a manner which appears to us to call for some remark. We have only space here to quote some of his statements, and must refer the reader for his whole discussion of the subject to chapter III of the above-mentioned work.

Sir James Stephen's use of the terms 'will' and 'intention.'

"The sensations," he says, "which accompany every action and distinguish it from a mere occurrence are intention and will. The first step towards an action is, that, to use a common and expressive phrase, it 'occurs to the mind.' A mental image more or less definite of the thing to be done is formed by the imagination. The next step is deliberation, whether or not the thing shall be done and this terminates in a mental crisis, which constitutes the resolution to do it. The next step after resolving upon the act is the selection of means for its execution, and during the whole period

over which this preparation extends the person is said to intend to do the act. This original metaphor which suggested the word is, like all such metaphors, most expressive. Intention is 'stretching towards' fixing the mind upon the act, and thinking of it as of one which will be performed when the time comes. When at last the opportunity arrives, a second crisis or spasm takes place. The man wishes in that peculiar way which is called willing, and thereupon the different members of his body go through certain motions. What the nature of this crisis is, how such a wish differs generically from other wishes, why it instantly fulfils itself, are questions which have never been answered ; but about the fact there can be no doubt. Every human creature attaches to the words 'to will,' or their equivalents, as vivid a meaning as every man with eyes attaches to the words 'to see'. To will is to go through that inward state which as experience informs us, is always succeeded by motion, whilst the body is in its normal condition." (a)

Of course no psychologist would speak of intention and will as *sensations* which accompany action, but we are not here concerned with criticising the terminology employed : the passage is quoted because it gives the view of a well-known lawyer as to what is the state of mind in which intention consists, and the description here given appears to us to bear out the contention to be found in these pages, (b) that there is a difference between the actual and the implicit which cannot be ignored. If intention and will really involve a process of the kind pictured by Sir James Stephen, and as a general description of action we do not challenge it here, it seems to us clear that no one who seeks the truth will consent to identify such a process with the state of mind that co-exists with actions of the instinctive impulsive kind ; nor will he any longer accede to the legal proposition that the question of intention is merely the question of the implicit knowledge of the individual to be inferred from the results of his acts.

(a) Stephen, *General View of the Criminal Law of England*, Ed. 1863,

pp. 76-7.

(b) See pp 48, 49.

When, however, our author goes on to speak of the relation of intention to will, we are unable to accept several of his statements. Intention, he says, is that which combines and co-ordinates the bodily motions towards one common end, the contemplation by the mind of one common result towards which they are all directed ; he then continues : “an action therefore may be said to consist of occurrence to the mind, deliberation, resolution, intention, will and execution by--or if the expression be allowed translation into--a set of bodily motions co-ordinated towards the object intended. This process, and every step in it, may be compressed into an infinitesimally small space of time, or extended over many years, and all the stages run into each other, for a man may be irresolute even while he is executing his purpose, and he must continue to intend whilst he wills it ; but in order that there may be any action at all, the will which causes, and the intention which co-ordinates bodily motion must always be present. The absence of both or either would prevent the action from taking place at all, or reduce it from an action to a mere occurrence, and in either case there would be no crime.

“In order to illustrate this, cases may be put to show the effect of the absence of both or either. First, will and intention may both be absent. A man in a convulsive fit strikes another and kills him. He has committed no crime because he has done no act. He has been acted upon. . . . Secondly, will may exist without intention. This case is best illustrated by the motions of an infant. A new-born child moves its hands and arms and lays hold of anything put between its fingers. Every analogy leads us to believe that these motions are voluntary, that they are preceded by an exertion of the will generically similar to exertions of the will in adults ; but the co-ordination of such motions towards an object specifically contemplated is a habit which children learn by degrees, and do not thoroughly master for several years. Probably somnambulism and other movements during sleep are of the same kind. They are voluntary ; but as they are not co-ordinated with a view to any definite result, they are not accompanied by any intention. . . . Thirdly

intention may exist without will. This happens in the common case of a person who lays aside a plan which he has formed. Here there is obviously no action; but it is conceivable, though scarcely possible, that the event intended might occur without an act of the will, in which case there would be no crime. In order that this might happen, the bodily motion necessary to bring about the purpose intended must be caused by some other means than an act of will. The result of the whole is that an action consists of voluntary bodily motions combined by the mind towards a common object. Intention is in every case essential to crime, because it is essential to action, and every crime is an action, as appears from the use of active verbs in every indictment.”(a)

2. It appears to us that a view according to which will is merely superadded as the last stage of a process throughout which intention is present is incorrect: we agree that when action

Criticism of the
above views.

follows the presentation of the idea to the self, at that stage it may be said there is an act of will, but the process of willing, though incomplete until then, is present throughout. It starts with the presentation of the idea to the self, or, to use another term, its occurrence in consciousness, and it is completed when that idea is translated into action: it is in fact, in its early stage, identical with intention and only becomes differentiated from the latter by its emotional element and the fact that it passes into action, whereas we may have mere intentions which are never carried out.(b) In the present passage however intention has been unduly exalted into what should more properly be described as Resolve or Aim, which is not co-extensive with every intention but only with those intentions which are reached as the result of deliberation and choice, and are thus transformed in a higher stage: whereas will is practically identified with mere impulse, which is only a part of it, and the presence of idea in will is entirely ignored.

(a) *Ibid.*, pp. 78-81.

(b) See p. 31.

It is not within the scope of this work to discuss the possibility of inter-action between body and mind, but we must maintain that to speak of will as the cause of bodily action and contrast it with intention as something entirely apart from will, will being apparently the instrument by which intention directs bodily action, is both psychologically false and an unnecessary supposition.

We do not object to the statement that will and intention may both be absent when, what Sir James Stephen here designates as an 'occurrence' takes place, but we must deny that will may exist without intention. The motions of an infant in so far as destitute of intention are in our opinion equally destitute of will, and it is simply because they can be described as 'voluntary' in the sense of being unconstrained that our author's assertion to the contrary appears to have any plausibility.

It is not true that the new-born child displays 'will' in even a rudimentary sense of that term as it is usually employed: such movements are far more truly described as reflex or mere re-actions to sense stimuli.

"Distinct grasping movements," says Wundt, "develop gradually from the aimless movements that are observed even in the first days but do not, as a rule, become certain and consciously purposive until aided by visual perceptions, after the twelfth week. The turning of the eye toward a source of light, which is generally observed very early, is to be regarded as reflex. The gradual co-ordination of ocular movements is the result of these reflex adjustments the whole development is a gradual continuous process, and is from the first inter-connected with its original physiological substratum".(a) Further, speaking of the development of the will, the same author says that, though many animals execute immediately after birth fairly perfect impulsive movements, owing to their possession of inherited reflex

(a) Wundt, *Outlines of Psychology*, p. 318.

mechanism of a complex character, the new-born child does not show any traces of such impulsive acts. It merely shows the earliest beginnings of simple volitional acts of an impulsive character, which result from the reflexes caused by sensations of hunger and by the sense of perceptions connected with appeasing hunger. The primitive volitional acts grow out of these reflexes. He estimates that the first indications of a simple volitional process made up of motive, decision and act do not appear until the twelfth or fourteenth week, while complex volitional acts developing from these simple ones are not observed until the beginning of the second half of the first year.(a)

Now by 'simple volitional acts' Wundt does not mean the same as 'voluntary acts' as has been already explained(b), and we cannot therefore allow the presence of will in the new-born child.

The instances of somnambulism and other movements during sleep next cited are not naturally explained in such a manner. In sleep a certain idea gets a predominance in the mind owing to the absence of the usual inhibitory influences, and then translates itself into action according to the recognised² ideomotor tendency. It is true that in normal cases of will the voluntary decision similarly gives the predominance to the representations of the act decided on as against the representations of alternative courses: after the conflict of ideas, with the decision comes the belief that one of the ideas is to be carried out to the exclusion of the others, and this belief gives to the idea of the action the predominance leading to its execution.(c) In the case of movements during sleep there is no contest of ideas as the result of which one gets the predominance but, owing to the fact that the higher centres are cut off and the critical faculty absent, the idea which suggests itself has full sway without any dispute. But the resulting action is quite different from one that is the outcome of an act of will.

(a) Wundt, *Outlines of Psychology*, p. 322-3.

(c) Cf. Stout, *Manual of Psychology*, p. 619.

(b) See pp. 32 *et seq.*

As to actual cases of sleep-walking the most that can be said is that whereas in ordinary sleep and dreams excitability is limited entirely to the *sensory* functions and external volitional activity is *completely* inhibited, in somnambulism the fanciful ideas of dreams are connected with corresponding volitional acts and the will is not completely inhibited.^(a)

It seems, however, certainly incorrect to say that these movements are not co-ordinated with a view to any definite result : the state of somnambulism is similar to that of hypnosis in which the attention is concentrated on one thing, generally the command of the hypnotizer, and this concentration is one of the essential features. The fact that the idea on which the movements follow is suggested from outside or arises in the mind of the sleeper from unexplained or unusual sensations, does not warrant the inference that the movements are not due to an idea at all but are entirely automatic or uncontrolled.

How far it is true that we may have intention without will, has been already discussed^(b): the cases, however, in which it is allowed that this may be so, have no similarity to the one here suggested, *viz.*, that of laying aside a plan which a man has formed. It seems to us clear that in such a case we have the very result described a few lines above as voluntary decision in which after ideally representing alternative courses one idea is eventually carried out to the exclusion of the other : we are simply at a loss to understand on what grounds the presence of will can here be denied.

Nor does the other instance imagined for the sake of illustration appear to us to help his theory. "Suppose a man", he says, "having resolved to push a man over a cliff, and having approached him for that purpose, were to be seized with a convulsive fit by which his arm received the very impulse it could otherwise have received from his own will. This would be a case of intention without will." Obviously there is no intention

External action not
necessary to will.

(a) Wundt, *Outlines of Psychology*,
p. 303-5.

(b) See pp. 36, 37.

present in the man's mind at the time the convulsive fit is on him, whatever there may have been just previous to the fit, and such a case is in fact the very one which is given by our author on the preceding page as an instance in which both will and intention are absent, and which we quoted above. If, however, under such circumstances the presence of intention can be imagined, it would be equally easy to allow the presence of will; and, in fact, it would appear to us that it would then be impossible to say that the action was not the result of will rather than of the reflex or other movements which constituted the convulsive fit, unless the influence of ideas on action be altogether neglected. The explanation of our author's view appears to be that he considers external action to be necessary to will, and therefore he does not admit an act of will in the case, *e.g.*, of the man who lays aside a plan. But this attitude has no justification, and we may quote concerning it the words of Wundt: "External acts of will are the only ones in the whole sphere of volitional processes that force themselves emphatically on the attention of the observer. As a result the tendency was to limit the concept will to external volitional acts, and thus not only to neglect entirely the whole sphere so important for the higher development of will, namely, internal volitional acts, but also to pay very little attention to the components of the volition which are antecedent to the external acts, or at most to pay attention only to the most striking ideational components of the motive." (a) This truth accounts partly for the favourite method among the lawyers of trying to discover intention by regarding exclusively the external act and its results and neglecting entirely the antecedent mental state.

3. Some further examples of Intention will now be given, and also instances of the use of will, motive, &c.

In the case of *Shwe Hla U. v. King-Emperor*(b) the accused in a scuffle, brought about immediately by provocative words used by

(a) Wundt, Outlines of Psychology, p. 211.

(b) Lower Burma Rulings, p. 125.

the deceased, struck the latter two blows on the head with a pint bottle of brandy. Deceased fell at the second blow, and remained unconscious till his death, thirteen hours afterwards. It was held that the repetition of the blow brought the case within the third clause of s. 300, Indian Penal Code, the learned Judge arguing as follows :—‘ The act of the accused must be judged by the light of the common knowledge of mankind upon the dangers and results of striking a person on the head.’ ‘ Ignorance of the actual causes which may bring about another’s death in consequence of a blow cannot affect the question of the striker’s knowledge and intention when striking the blow. If actual knowledge and experience do not do so, instinct at least tells every man that to hit another human being any violent blow on the head may possibly result, or is likely to result, or will probably result in serious injury to the person struck, but knowledge, belief or expectation of the amount of injury that may be caused must depend on what is used in inflicting the blow, and the force with which the blow is delivered. A man is presumed by law to intend the ordinary and natural as well as the necessary consequences of his acts.’ Then we have Mr. Mayne’s dictum quoted that ‘ the question of intention is in the majority of cases merely the question of knowledge,’ and further enlarged on. It is then remarked that ‘ in the case of a blow with a bottle full of liquid, there is no common experience or knowledge to tell a man what the probable result of a blow on the head with such a thing will be,’ and that ‘ although the blows in the case were given during the course of a drunken brawl, the acts of the accused have to be considered as if they were the acts of a thinking and reasoning man.’ Then the following conclusion is drawn : that in the case of death caused by a single blow with a bottle it could only be imputed to the striker that he must have known that he was likely to cause death or injury sufficient in the ordinary course of nature to cause death, but as the accused struck a second blow, ‘ at the time he dealt that, he must be taken to have known that he was using a breakable but yet a hard thing which had withstood one violent blow on his opponent’s head, and

consequently there was reason for his believing that the bottle would probably withstand another. Every man must be taken to know that if he repeats violent blows with anything substantial and hard on another man's head, he will probably either kill the man, or cause him such injury as is sufficient in the ordinary course of nature to cause death.' Owing to the repetition of the blow it was therefore held to be murder.

We have selected this case as a particularly bad instance of blindly following Mr. Mayne's dictum, and so arriving at results which appear to us to be purely imaginary and utterly unlike what was probably the real state of the accused's mind at the time. An angry man in the accused's position,—omitting all consideration of the fact that it was a drunken brawl, would have acted on instinctive impulse in the way described in the preceding chapter, and his mind would have been very much in a blind or blank state, containing at the most a general idea of striking (*a*) : all that he was taken by the learned judge to know at the time he dealt the second blow, viz., that he was using a breakable but hard thing, &c., &c., &c., &c. (see above) was therefore simply a fancy picture and to attribute this stream of ideas to him between the striking of the first and second blow, apart altogether from the question of the rate of mental pace, appears to us to be little short of a *reductio ad absurdum* of the theory that knowledge equals intention, and that a man must be taken to contemplate the natural results of his acts.

There is also another objection to the method. The judge appears to consider that it is sufficient for an idea to be true and clearly conceived to make it an incentive to action, hence if he can attribute the ideas described above to the accused and justify them as being the ideas which others hold, he thinks he has done all that is required. He never seems to suspect that an idea can only supplant a feeling on condition of becoming a

(*a*) See para. (1) of the last chapter, under the heading 'The Idea in Will and Impulse' and para. (3) under the

heading 'Two classes of actions,' and para. (4) *ad fin.* 'State of mind in anger.'

feeling itself, and it is idle otherwise to assert that such ideas ought to have restrained the man from his act. "The intellect," says Ribot, "is capable of instantaneously finding out a new truth, or recognising an idea as just and conformable to the nature of things; but all this remains in a theoretic condition, *i.e.*, without emotional colouring or tendency to realise itself. That which is discovered so rapidly by means of logic, takes years or even centuries to become a motive for action." (a)

But further let us consider how he was assumed to be in possession of such knowledge: twice over the judge enumerates as his sources of knowledge, the ordinary knowledge and experience of mankind and instinct, but he expressly says that there is no common knowledge or experience to tell a man what the probable result of a blow on the head with a bottle would be. It can hardly be assumed that while there is no such ordinary knowledge or experience as to the effect of one blow there is as to the effect of two blows from a bottle, at least we do not see on what possible grounds such a statement could be made; it therefore seems to follow that in this case instinct was the source of the knowledge. Now we should in any case like to ask the learned judge what he means by this term instinct, as it seems to us impossible to make instinct equivalent to reason, as he appears to desire to do. Instinct though purposive is involuntary and cannot be explained either in terms of conscious reflection or from individual associations (b) and there is in it an instantaneous transition from excitation to movement with no interval. (c) The very essence of instinct is that it is unreasoning, and unless therefore it is identified with experience, from which it is expressly dissociated here by the judge, it can tell us nothing, though it may drive us to blind action. To make it equivalent to either knowledge or intention as the learned judge seems to do is mere error, but unfortunately with

(a) Ribot, *Psychology of the Emotions*, p. 192.

(b) Wundt, *Human and Animal Psychology*, pp. 392, 39

(c) Höffding, *Outlines of Psychology*, p. 92. See also preceding chapter, para (2).

disastrous results to the accused ; but we object strongly to the use of the term here and regard it as a mischievous word because it tacitly professes to make allowances for unskilled people and ignorant races, whereas it has really been employed to mean something quite different from any acceptance of it that we know of. A slight knowledge of psychology would have prevented this mistake.

4. The form in which the doctrine is sometimes expressed is that “a person is presumed to intend the natural and *legal* consequences of his acts” (*a*) the presumption of intention following of course, on the principle which is already familiar, from the previous presumption of knowledge. We shall now give an example of what follows from presuming that a man intends the legal consequences of his acts.

Section 366 of the Indian Penal Code creates a more serious offence than s. 363 (which provides for kidnapping from lawful guardianship) and runs as follows :—“Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished, &c.”

The Special Court of Lower Burma decided in the case of *Q. E. v. NeU(b)* that as a Burmese Buddhist girl who is a minor cannot contract a valid marriage without the consent of her guardian, it therefore must necessarily follow that anyone who kidnapped or abducted her must do so in order that she may be forced or seduced to illicit intercourse. It may be explained that frequently young Burmans, when the parents of the girl did not consent to the marriage, would abduct the girl in order to marry her without their

(*a*) Lawson on presumptive evidence, Rule 96 ; Best on Evidence §336.

(*b*) Selected Judgments, Lower Burma, p. 202.

consent, and were then prosecuted under s. 366, on the ground that they must be taken to intend the legal consequences of their act, which would be illicit intercourse, such a marriage not being a valid one. This decision was followed in the case of *K.-E. v. Nga Po Saw(a)*, the Judicial Commissioner remarking that the reasoning of the Special Court appeared to him correct. Nevertheless there has always been a feeling that the decision was wrong, and at length it was dissented from in the case of *Crown v. Nga Chan Mya(b)* where the Chief Court held that if a Burmese Buddhist girl under 16 years of age elopes with a lover of her own free will, intending to cohabit with him, the resulting sexual intercourse is not necessarily illicit, and that s. 366 does not apply to a case in which a minor girl, at the time of the kidnapping from lawful guardianship, intends to cohabit of her own free will with the kidnapper.

This, however, has again been dissented from by another Judicial Commissioner of Upper Burma in the case of *K.-E. v. Nga Ni Ta,(c)* who seemed to think that the points to be considered were whether the intention to seduce must be subsequent to the elopement and not previous to it while the girl was still in the custody of her parents, and whether the mere elopement of the couple constituted marriage if that was the intention of the parties.

That decision in its turn has been yet again dissented from by a later Judicial Commissioner in the case of *Nga Tha Zan v. K.-E.,(d)* on the ground that it depends on when the seduction is effected.

To us it appears that the real point in the case has never yet been brought to light, because of the doctrine that the man who elopes with the girl must be presumed to intend the legal consequences of his act. The reason why it has been felt that the original decision of the Special Court was wrong, is simply because that decision attributed to the accused an intention

(a) Upper Burma Rulings, 1897-1901, p. 328.

(b) Lower Burma Rulings, Vol. I, p. 297.

(c) Upper Burma Rulings, 1903, Penal Code, p. 15.

(d) *Ibid*, 1905, Penal Code, p. 19.

which was the opposite of that with which he really did the act: for in these cases the accused really does intend a marriage and so also does the girl, and the mere fact that he cannot legally accomplish his intention cannot alter that intention itself. An intention often cannot be carried out or it is attempted to be carried out unsuccessfully, and we may remind the reader that Intention and Resolve are distinguished from Volition by Mr. Bradley expressly on the ground that in them the idea does not actually carry itself out but we have such things as mere intentions and mere resolves(*a*): but the intention is there none the less and it is only because the lawyers will judge of the intention solely by the results or the possible results of the act that they are able to presume that the accused never had such an intention. Surely a method must be held to have broken down when it results in treating a man as guilty of an intention which every one would probably admit he never had when he abducted the girl, which simply flies in the face of the truth, and rests on a double assumption neither of which is to our mind correct. The Judicial Commissioner disputes with two judges of the Chief Court that the test is the real intention of the parties, *i.e.*, as to whether, if the intention is to marry, that in itself would constitute a marriage; but, apart from the absurdity of attributing to an ignorant Burman accurate knowledge on a point of civil law about which even these authorities cannot agree, that was not the matter to be decided. The test is the real intention of the parties, *viz.*, whether they intended it to be a marriage or not, and, if so, whatever the actual result of their elopement may be, there will be no offence under s. 366, *pace* the legal presumptions of Mr. Mayne or any of the writers on Evidence. For the question of intention is the question of what determined the action, *i.e.*, the feeling, the motive, the desire of the man but not his knowledge, much less the knowledge attributed to him by legal text-books, as we have pointed out again and again in our last chapter.

(*a*) Mind N. S. No. 44, pp. 447-8.

5. Intention in estoppel will be the next subject of consideration. The following is the section relating to it in the Indian Evidence Act (s. 115):—"When

Intention in
estoppel.

one person has by his declaration, act or omission, *intentionally* caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. *Illustration.*—A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it, &c."

Let us compare with this some of the utterances of the commentators. "As it is immaterial in what form the representation is made, so it be a representation, so also is it immaterial to know what the motive or the state of knowledge is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of the party estopped, but the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct." (a)

Now, however you may twist the words of the section you cannot get away from the fact that not only has the person deceived to act upon the representation but the person making it has also to *intend* to cause or permit the other party to believe it and to act on it: if therefore the question of intention is the question of knowledge, as Mr. Mayne holds, so far from it being immaterial to know the state of knowledge of the party making the representation, it is highly important to know it in order to show his intention. We do not ourselves think the view of the commentators to be right, but such as it is, we would point out that it is inconsistent with the "knowledge equals intention" theory.

The next utterance is, however, still more explicit for it actually includes 'intention' in what is immaterial. "Assuming that there has been a representation in the sense mentioned and that that

(a) Ameer Ali and Woodroffe, 2nd Ed., Indian Evidence Act, p. 833.

representation is clear and unambiguous, and the other party has been induced to act thereby, it is immaterial what the intention, motive or state of knowledge of the party making the representation was. But though the intention is immaterial so far as the creation of the estoppel is concerned, representations may be, and have been, classified with reference to the intention with which they may be made. A person may be estopped, if he has made either a fraudulent misrepresentation, or made a false statement without fraud but negligently, or has made a false representation without fraud or negligence." (a)

This passage merits attention: the first part of it is simply directly opposed to s. 115 and shelves intention altogether. The middle part of it shows a disposition to hedge, but the third part gathers boldness and goes even beyond the first part, laying down that a man creates an estoppel if he makes a false statement 'negligently,' i.e., *without* the intention of doing so. For the meaning of negligence is nothing more nor less than the *absence* of intention, as these very commentators themselves state in the following words:—"It must however be remembered that probable consequences may result from acts as to which the law, *by pronouncing them to be negligent, expressly negatives intent*; and it would be repugnant to justice that one should be conclusively presumed to intend the consequences of his accidental or unavoidable acts." (b)

We can heartily agree with this last clause, it is part of what we have been contending for in the preceding chapter, and we would ask the reader to apply it when he is told that intention must be judged by the results of an act and that every one must be presumed to intend the natural and probable results of his acts.⁷

In view of the above quotation it is somewhat perplexing to find these commentators elsewhere holding that "at the same time a party by negligence in asserting a claim may be afterwards estopped from setting up such claim against strangers," (c) and again

(a) Ameer Ali and Woodroffe, 2nd Ed., Indian Evidence Act, p. 841.

(b) *Ibid.*, p. 804.

(c) *Ibid.*, p. 857.

“Negligence when naturally and directly tending to *indicate intention* will therefore have the same effect in creating the estoppel as actual intention.” (a) That is to say that the absence of intention indicates intention : there are some who will assert that black is white, there are others who will believe it if stated by persons of sufficient authority, we must decline either to take this leap or follow any one else who does so.

We must pause however and point out how this legal somersault has come to be performed : this also must be laid to the charge of our legal presumptions and the lawyers’ ignorance of psychology. For they have introduced a doctrine that intention “may be ‘presumable’ as well as ‘actual’, so that a man would be bound as well when his conduct or the circumstances of the case justified the inference of intention as when he actually intended the result,” (b) and this has been reduced to two recognised propositions in the following terms :—“(3) And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were represented. (4) There is yet another proposition as to estoppel. If, in the transaction itself, which is in dispute one has led another into belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist.” (c)

This simply makes a reasonable man’s inference and not the actor’s intention the test of the estoppel to the complete disregard

(a) Ameer Ali and Woodroffe, 2nd Ed., Indian Evidence Act, p. 858.
(b) *Ibid*, p. 858.

(c) *Carr v. L. and N. W. R. Co.*, L. R., 10 C. P. 307, (1875), quoted pp. 842-3, Ameer Ali and Woodroffe.

of the words of the law, and as regards the two propositions quoted, the first gratuitously drags in the reasonable or normal man, as to the difficulties of which test the reader is referred to our chapter on the Theory of the Normal Man; the second similarly introduces all the difficulties of the meaning of 'proximate cause' which are discussed in our chapter on Causation.

It is not surprising to find, that though the first proposition was adopted in Indian law in the case of *Sarat Chunder Dey v. Gopal Chunder Laha*, in another case (*Syed Nurul Hossein v. Sheo Sahai*) where the facts were similar there was held to be no estoppel.^(a)

Psychology, however, teaches that intention has nothing whatever to do with other persons' inferences from conduct, and we need not here repeat in what it does consist: its opposition to the legal point of view may be enforced by a quotation from another author:—"It is always in short the apparent, not necessarily the real intention of a promisor by which he is bound. The law looks as regards intention and most wisely, to the natural result of a man's acts and not to the condition of his mind. From a legal point of view a person intends whatever he gives others reasonable grounds for supposing that he does intend."^(b) This is an explicit declaration that the law does not look to the real intention. The same writer with equal candour further avows that it is the office of the Court to assume as the true intention of the party something which is not so: "It was once even supposed," says Sir Frederick Pollock, "that parties could not make time of the essence of the contract by express agreement; but it is now perfectly settled that they can, the question being always what was their true intention, or rather what must be judicially assumed to have been their intention."^(c) Will any one longer contend that the legal doctrine of intention deals with realities and is not a fiction and a sham?

(a) Ameer Ali and Woodroffe, 2nd Ed., Indian Evidence Act, p. 842, Note 4.

(b) Dr. Rashbehary Ghose, The Law of Mortgages in India, 3rd Ed., p. 500,

quoting Sir F. Pollock in 10 L. Q. R., p. 8.

(c) Pollock, Principles of Contract. p. 505.

A perhaps even more blatant assertion that in estoppel 'intention' is not to be understood in any intelligible sense of the verb to intend is the following : " It is not necessary in order to raise an estoppel to prove that the person against whom it is to be used had any intention to mislead or deceive"(a) , or again, "According to section 115 of the Evidence Act, the one person must intentionally by his act or declaration have caused or permitted another person to believe a thing to be true and to act upon that belief. That, however, does not mean that he must have intended to mislead. It is not so much his motive or intention as the effect which his representation as to an existing fact is likely to have on others, that has to be regarded ; for, if it was such as to gain credit with a reasonable person and induce the belief that it was intended to be acted upon, then a case of estoppel arises."(b) One is tempted to say to these lawyers "verily by your traditions ye make the word of the law of none effect."

6. If the commentators were unfortunate in their explanation of 'negligently,' they have hardly been 'Wilfully' in estoppel. less so in the way they have treated 'wilfully.' The word bears on its face the etymological meaning of 'will,' as is recognised, *e.g.*, in the following attempt to define 'wilful default' : " wilful implies nothing blameable, but merely that the person of whose action the expression is used is a free agent, and that what has been done, arises from the spontaneous action of his will."(c) It therefore implies an act of will, the psychological explanation of which has been given in the preceding chapter.(d)

Best after quoting the doctrine of estoppel as follows : "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, &c."(e) adds "by 'wilfully' in this rule must be

(a) Cunningham and Shephard's 9th Ed. of the Indian Contract Act, p. 82.

(b) *Ibid*, p. 461,

(c) Dr. Kashbehary Ghose, *op. cit*, 623-4.

(d) See preceding chapter, para. (1) especially, and *passim*.

(e) Best on Evidence, §543 ; *Cf.* also Pollock. Principles of Contract, pp. 523-4.

understood not that the party represents that to be true which he knows to be untrue but only that he *means* his representation to be acted upon, and that it is acted upon accordingly. For if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take his representation to be true, and believe that it was meant that he should act upon it. . . the party making the representation will be equally precluded from contesting its truth."

If by 'means' his representation to be acted upon, the author does not mean 'intends' it to be acted on, we cannot conjecture what he does mean : while if that is his meaning, then he goes on to repeat the same assertion that we have already criticised, that the man's real intention is immaterial and other people's inferences are the criterion. The substitution of 'wilfully' for 'intentionally' however does not improve matters, as it is a stronger expression implying that the agent's self is carried out into the act in a higher degree, and therefore it makes it more difficult to neglect it altogether and substitute the reasonable man's expectation for it. It further makes one more word of the English language rendered unintelligible by law.

'Wilfully,' however, is elsewhere said to be in effect equivalent to 'intentionally' or 'voluntarily,'^(a) and it would naturally follow from this that it was opposed to 'unintentionally,' a conclusion which however seems to have alarmed Parke, B., in the case of *Sarat Chunder Dey v. Gopal Chunder Laha*. An effort was made by the Madras High Court in *Vishnu v. Krishnan* ^(b) to make a distinction between 'intentionally' and 'wilfully,' and to hold that it was intended to exclude cases from the rule in India to which it might be applied in English law, but the Privy Council overruled this in the case quoted a few lines above. The result therefore seems to be that both expressions are to be identified in law and given a significance which they bear nowhere else, that we know of, and which is opposed to their psychological meaning : and yet

(a) *Ameer Ali and Woodroffe, op cit.*, p. 857, and note 8 there.

(b) *I. L. R.*, 7 Mad., 3, 8 (1883).

Sir Frederick Pollock says "Even if the terms were used by lawyers in a peculiar sense, there would be no need for apology ; *but the legal sense is the natural one.*"(a)

The meaning of 'intention' has been similarly twisted in cases of actual fraud ; a single instance will suffice. "Misrepresentation, (otherwise called *Suggestio Falsi*) " says Snell, "is where a party intentionally misrepresents a material fact, and so produces a false impression"(b) and then on the same page "And misrepresentations will amount to fraud, not only where they are known to be false by those who make them, but also (at least for some purposes) where they are made by persons who do not know them to be true or false and yet make them or *who believe them to be true*, when in the due discharge of their duty, they ought to have known (and ought to have remembered) the fact which negatives their truth."

Thus a person who makes a representation believing it to be true is held by law to intentionally misrepresent on the ground that someone else thinks they ought to have known, and apparently, according to such a doctrine, anyone is at the mercy of anyone else's view and the last thing to be considered in order to attribute intention to a man, is what he himself thought. Could anything be more preposterous or a greater inversion of fact than this ?

No attempt is here made to define 'ought' or to explain how it is to be applied to memory where it is merely a question of fact, for though you may aid you cannot force a memory, and it seems that 'intention' is also to be presumed to exist in the absence of knowledge though elsewhere intention and knowledge are held to be the same thing. Such contradictions would, of course, be impossible, if it were not for the legal presumptions employed.

(a) Pollock on Torts, p. 421.

(b) Snell, Principles of Equity, 13th

Edn., p. 463, quoting *Hill v. Lane*,
L. R. 11 Eq. 215.

There is an interesting discussion on the law of merger, (a) the question being whether in certain cases reviewed, it was the intention of the party paying off the charge to keep it alive or not.

Intention in cases
of merger.

The matter seems now settled for India by the concluding words of s. 101 of the Transfer of Property Act which provide that the charge is not extinguished when its continuance is for the party's benefit, yet nevertheless judges have still spoken of the question of intention. (b)

It will be seen that the difficulties in these cases arose from identifying intention with knowledge : thus the Madras High Court in the case of *Shan Maun Mull v. Madras Building Co.* (c) were perplexed by the argument that an intention to keep alive an earlier security cannot be presumed, except where the person entitled to it has notice of later incumbrances, and that at any rate, it would not subsist if the deed of conveyance purports to extinguish it, and they tried to limit the words 'or such continuance would be for his benefit' in s. 101, Transfer of Property Act, to the time when the conveyance was executed. A similar view was taken by the Bombay Court in *Bapu v. Mahadaji* (d) where the circumstances from which an intention could be presumed really means the state of the man's knowledge at the time. But clearly in such cases the natural results of the man's act and the knowledge of it at the time are not the measure of his intention, for often the person paying off the charge is ignorant of what will subsequently result, and yet he must be presumed to have acted with the intention of providing against what he did not know and did not expect would happen, what was in fact not the natural or probable result of his conduct if he allowed the charge to be extinguished.

7. Motive was defined in paragraph 3 of the preceding chapter and we shall here examine some uses of it in law.

Use of motive in
law.

(a) Dr. Rashbehary Ghose, *op cit.*, pp. 561-575.

(b) *Ibid.*, p. 573, *et seq.*

(c) 15 Mad., 268, 280.

(d) 18 Bom. 348.

In the case of *Thomas v. Thomas* (a) Patterson, J., distinguishes 'motive' from 'consideration.' We confess that we do not understand fully what he there says, but the fact that such distinction was called for seems to show that there must have been some loose use of motive in law. Motive, as we understand it, is the idea of a thing which excites the feelings, or you may speak of the desire of it as adopted by the self as the motive; but the consideration is the actual thing itself which is given or promised the *quid pro quo*. When it is said that "This act, abstinence or promise is the motive of the promisor's promise, and is defined as the consideration for it," (b) motive appears to be identified with consideration and to be used in the sense of final cause. In commenting on s. 22, Indian Contract Act, which provides that 'a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact,' it is said "mistake in the motive which induces a person to enter into a contract is no ground for avoiding it." (c) Again referring to the same case (*Balfour v. The Sea, Fire and Life Assurance Co.*, 27 L. J., C. P., 17) it is remarked: "It turned out that the proceedings were ineffectual for the intended purpose; still it was held that the mistake of the defendants was no defence to an action on the bill, it being a mistake merely in motive." (d)

It appears to us that in the case in question there was no mistake of motive or intention, if motive is used for intention, but merely mistake in the knowledge of what had happened, or a mistaken supposition as to what would happen, and to speak of 'motive' here is simply misleading. For what happened was that the defendants thought that arrangements for amalgamating their company with another were complete, and so gave a bill of exchange, whereas the arrangements proved abortive.

(a) 2 Q. B., 851, quoted in Cunningham and Shephard's 9th Edn. of the Indian Contract Act, p. 15.

(b) *Ibid.*, Introduction, p. iii.

(c) *Ibid.*, p. 92.

(d) *Ibid.*, p. 231.

*This case is
followed in America*

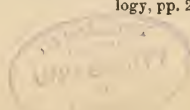
A distinction is drawn by Sir Frederick Pollock between 'motive' and 'intention' in speaking of the case *Williams v. Carwardine*, in which a reward had been offered by the defendant for information which should lead to the discovery of a murder. Plaintiff made such a statement but not with a view to obtaining the reward, but the Court held that he had a good cause of action because he performed the condition mentioned in the advertisement and this effected a contract, and "the motive with which the information was given was immaterial." On this the author remarks "but on this it must be observed that the question is not of motive but of intention. The decision seems to set up a contract without any privity between the parties." *a)* We must confess that we do not understand the force of the first part of this criticism: motive, as the Court appear to have used the term, seems to be practically equivalent to intention, and the whole passage rather suggests that it is taken instead in the treatise to be much the same as consideration. Elsewhere the same author tracing the doctrine of consideration says that it came to mean in the end 'that which induces a grant or promise,' *(b)* which tends somewhat to introduce the causal conception but without clearly distinguishing the sense in which it is employed. The fact is that the term 'motive' is frequently used ambiguously: it sometimes refers "to the various conations which come into play in the process of deliberation and tend to influence its result, or it may refer to the conations which we mentally assign as the ground or reason of our decision when it has been fully formed. In other words, a motive may be either a motive *for* voluntary decision or a motive *of* voluntary decision." *(c)*

It is probably this double use of 'motive' which has led to unfruitful attempts to regard 'intention' and 'motive' as entirely apart. Thus Sir James Stephen speaking of 'malice' says: "It seldom has any meaning except a misleading one. It refers

(a) Pollock, *Principles of Contract*, 7th Edn., pp. 21-2.

(b) *Ibid.*, p. 170.

(c) Stout, *Groundwork of Psychology*, pp. 233-4.



not to intention but to motive and in almost all legal inquiries intention, as distinguished from motive, is the important matter.”(a)

Mr. Mayne also seems to consider that motive and intention can be distinguished without difficulty. “Intention,” he says, “must not be confounded with motive. Intention shows the nature of the act which the man believes he is doing. If he fires at a tiger, and the ball glances off and kills a man, he intends to kill the tiger : he neither intends to kill the man nor to do any act which could have that result. Motive is the reason which induces him to do the act which he intends to do and does. If his act is absolutely legal, the motive which leads him to do it cannot make it illegal.”(b)

But what does Mr. Mayne mean when he says that ‘intention shows the nature of the act which the man believes he is doing’? Surely that the man puts before him a certain idea with the accomplishment of which he identifies his self : there is, as we have elsewhere said, the conscious presentation of an idea to the self as the object to be carried out. The important points are the idea and the presentation of it to the self. Do we find both these in motive, and if so, what else ? Motive, according to our author, is the reason which induces the man to do the act which he intends to do : but ‘reason’ is simply again the idea, and the inducing is the presentation to the self, though we may add that there is also the feeling which the idea excites. Motive is certainly not anything apart from the self : it cannot be regarded as something existing externally to it but it only becomes a motive in so far as it encounters the self and is adopted by it as an object of attainment.(c) Hence arises the feeling which is absent in intention : “for the ‘idea’ deals with an immediate content of experience and the properties that belong to it, without regard to the subject ; the ‘feeling’ expresses the relation that invariably exists between this content and the subject.”(d)

(a) Stephen, Digest of the Criminal Law, 3rd Edn., p. 204, note, 3.

(c) See p. 39.

(b) J. D. Mayne, Criminal Law of India, 2nd Edn., p. 244.

(d) W. Wundt, Outlines of Psychology, 2nd Edn., p. 184.

The difference between motive and intention seems therefore on analysis to depend on whether, when describing the mental state, we lay stress on the idea presented to the self or on the self to which the idea is presented and the manner of its presentation : in the former case we speak of intention, in the latter of motive, but in neither case can we attend exclusively to the one or the other. If we merely wish to describe the act we examine the content of the idea which came before the self, but if we wish to account for the act we look at the self and the way it was affected by the idea presented, or, in other words, we attend rather to the feeling excited by the idea. And this is natural because, as already stated, it is the feelings and not the intellect that explain conduct.

Motives, however, are not mere feelings : they are combinations of ideas and feelings. "Every motive may be divided into an ideational and an affective component. The first we may call the moving reason, the second the impelling feeling of action . . . The reason for a criminal murder may be theft, removal of an enemy or some such idea, the impelling feeling, the feeling of want, hate, revenge or envy. When the emotions are of a composite character, the reasons and impelling feelings are mixed, often to so great an extent that it would be difficult for the author of the act himself to decide which was the leading motive . . . In the combinations of ideas and feelings which we call motives, the final weight of importance in preparing for the act of will belongs to the feelings, that is, to the impelling feelings rather than to the ideas. This follows from the very fact that feelings are integral components of the volitional process itself while the ideas are of influence only indirectly, through their connections with the feelings."(*a*) This passage illustrates clearly that when the term 'reason' is employed in describing motive, it is to the idea in it that the notion is attached, to the ideational component and not the affective one. But this ideational side of motive is equally present in intention, and therefore the

(*a*) W. Wundt, *Outlines of Psychology*, 2nd Edn, p. 204.

distinction between them given by Mr. Mayne, *viz.*, that intention shows the nature of the act, motive the reason of it, is not the true one. The reason for the act is the idea in intention equally with the idea in motive, and any attempt to distinguish between the two psychical states must be made by laying stress on the feeling element which is present in motive but absent in intention : otherwise it seems to us practically impossible to keep separate meanings for the terms.

Of course if you choose to confuse the various meanings of 'cause'—as to which see the chapter on **Motive and Cause.** Causation—you can in one sense or other call many things a cause which are not really so, if you desire to retain any clear meaning for the causal conception. In this way 'motives' among other things may be termed causes, but no good in our opinion comes of confusing the Final with the Efficient Cause as appears to have been done above and also in the following passage :—"A motive is strictly what its etymology indicates, that which moves or influences the mind. An action without a motive would be an effect without a cause, and as, to take for example criminal cases, the particulars of external situation and conduct will in general correctly denote the motive for criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence." (a) And again "the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence. There must exist a motive for every voluntary act." (b)

Now motive in the sense of that which moves the mind is the idea of physical force contained in efficient cause, but 'inducing' cause and 'influencing' is the idea of purpose contained in Final Cause ; and while it is true that no action can be done without an agent to produce it, it is not equally true, if indeed it is true at all,—that every act must have a purpose, nor yet does every

(a) Ameer Ali and Woodroffe, *op cit.*, p. 65. (b) *Ibid.*, pp. 66-7.

purpose produce an action. "Between Cause and Motive," says Wundt, "there is a very great difference. A cause necessarily produces its effect: not so a motive. A cause may, it is true, be rendered ineffective, or its effect may be changed by the presence of a second and contrary cause, but even then the result shows the traces of it, and that in measurable form. But a motive may either determine volition or may not determine it; and if the latter is the case, then exerts no demonstrable effect." (a)

The fact is that though motives are of the nature of causes they are a class of causes that will not admit of the mathematical or mechanical treatment which is applicable to the scientific and popular conceptions of the term. It is the principle of sufficient reason rather than of causation which explains the relation between motive and conduct. (b)

On the whole we should say that the comparison of motives and acts with cause and effect above quoted contains more falsehood than truth. It is true that every effect must have a cause, but it is most certainly untrue that every act must have a conscious motive, which is the sense in which 'motive' is there used. Apart from the fact that mere reflex actions have clearly no motives there are many acts which once had a motive but have now become mechanical in the course of evolution, *e.g.*, twitching the ears, &c. Again, "in every asylum," writes Prof. James, "we find examples of absolutely unmotivated fear, anger, melancholy or conceit; and others of an equally unmotivated apathy which persists in spite of the best of outward reasons why it should give way," (c) and we have already referred to one class of acts done without a motive on instinctive impulse in which there is not in our minds a further end to which the act is a means. (d)

Nor does it assist to say that 'there must exist a motive for every *voluntary* act,' for if any real meaning is to be given to

(a) Wundt, *Human and Animal Psychology*, pp. 432-3.

(b) Cf. J. Ward, *Naturalism and Agnosticism*, Vol. I, pp. 176-7.

(c) W. James, *Principles of Psychology*, Vol. II, p. 459.

(d) Preceding chapter, para. 3.

'voluntary,' such acts must be distinguished from impulsive ones : as Prof. Stout says, 'voluntary action is to be sharply distinguished from impulsive action and deliberation from conflict of impulsive tendencies,' (a) and a very large part of our actions are impulsive. While if 'voluntary' is understood to imply an idea of the end in which the self is realised^z, then it is little better than tautology to say that every voluntary act implies a motive, for motive is simply such an idea of an end exciting our feeling.

It is really the thinking of the end that makes it a motive, and, when this is realised^z, all analogy at all events to efficient cause is gone, and with it the necessary connection between antecedent and consequent on which the argument relies.

8. The importance of understanding will may also be illustrated by a reference to voluntary confessions and consent in both civil and criminal law.

Will in voluntary
confessions

Although it is always laid down that confessions must be free and voluntary, the only way in which it is attempted to define the meaning of these expressions is by enumerating conditions which will invalidate the confession as, *e.g.*, that it must not be extracted by physical torture, coercion or duress of imprisonment, nor yet must an inducement be held out to the person confessing by anyone in authority. As it is impossible to enumerate everything which may constitute an inducement, or every one who may be in a position to influence the prisoner, many conflicting decisions on these points have resulted, (b) and it is clear that a definition of a less negative kind which had reference to the mental condition of the person himself would be more satisfactory. There is also another difficulty in the present method, *viz.*, that although there may be coercion, duress or an inducement offered, it does not follow that it was these or any of these which caused the prisoner to confess, and although it is usual for judges in such cases to

(a) Stout, Manual of Psychology,
p. 601.

(b) Best on Evidence, § 551 : Indian
Evidence Act, s. 24.

assume the causal connection this reasoning may easily be fallacious, and in fact the principle is admitted that it is possible by warning to dissipate the influence of an illegal inducement.

What we want to arrive at in each case is what was the content of the idea in the prisoner's mind and how far it contributed to the result, and it seems to us that it should make no difference to the voluntary character of the act, if the idea was suggested to him by someone else, provided that he deliberately adopted it. It would, in such a case, be merely a matter of whether the prisoner really consented to the suggestion or not, and to determine this we must consider in what 'consent' consists.

Such definitions and explanations of 'consent' as we know of in law are not very promising. Section 90 of the Indian Penal Code lays down that it must not be given under fear of injury or under a misconception of fact to the knowledge of the person profiting by it, nor yet can it be given by a person of unsound mind or intoxicated. These again are merely negative conditions.

In section 13 of the Indian Contract Act it is said that 'two or more persons are said to consent when they agree upon the same thing in the same sense, but this ignores the presence of will in consent, as to which the following may be quoted: "It is unqualifiedly true that if any thought do fill the mind exclusively, such filling is consent. The thought, for the time at any rate, carries the man and his will with it. But it is not true that the thought *need* fill the mind exclusively for consent to be there; for we often consent to things while thinking of other things, even of hostile things.'"(a)

We seem to be here on the right track, if the idea becomes dominant in the mind it carries the will with it, there must be, that is, an absence or extinguishment of contradictory ideas before we can consent to a thing. Thus the same writer says that belief is more allied to the emotions than anything else: it resembles consent which is a manifestation of our active nature. "What

(a) James, *op cit.*, Vol. II, p. 568.

characterizes both consent and belief is the cessation of theoretic agitation, through the advent of an idea which is inwardly stable, and fills the mind solidly to the exclusion of contradictory ideas. When this is the case motor effects are apt to follow. Hence the states of consent and belief, characterized by repose on the purely intellectual side, are both intimately connected with subsequent practical activity.”(a)

The following remarks in the commentary seem therefore to be inadequate: “to determine what are the essentials of consent is equivalent to determining what kinds of error or misunderstanding are incompatible with its existence,” and again quoting Lord Cairns in the case of *Cundy v. Lindsay*, 3 App. Cases, 464, “of him they knew nothing and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no consensus of mind which would lead to any agreement or any contract whatever.”(b) To define consent as a ‘consensus of mind’ is merely to repeat the same thing without explaining and further to introduce the additional idea of ‘mind’ which itself needs explanation.

Somewhat similarly in his remarks concerning the nature and scope of consent in contracts Sir Frederick Pollock says that ‘there must be the meeting of two minds in one and the same intention’, and he proceeds to add that ‘there must be included an intention that the matter in hand shall, if necessary, be dealt with by a Court of justice.’ It is evident that this imports into ‘consent’ much more than is included in the ordinary acceptance of the term, while the failure to recognize the presence of will in some form in consent ends in a curious result. After quoting with approval a dictum to the effect that “mental acts or acts of the will are not the materials out of which promises are made,” and that therefore a party is not allowed in law to show that his intention was not in truth

(a) James, *op cit.*, Vol. II, pp. 283-4.
 (b) Cunningham and Shephard, 9th

Edn., Indian Contract Act, pp. 48-49.

such as he made or suffered it to appear, he is finally landed in a distinction between 'real' and 'apparent' consent.^(a) Yet if this antithesis is a real one, paradox will be a mild description of what this apparent consent must be, while it will at the same time be difficult to see how, if the man intends something different from what the other party understands him by his conduct to intend, this can possibly be termed 'consent' in the sense of 'the meeting of two minds in one and the same intention.'

If we turn to the definition of 'free consent' (s. 14) we find again merely an enumeration of what negatives consent, *viz.*, coercion, undue influence, fraud, misrepresentation and mistake, but in the definition of undue influence (s. 16) it is said that the relations between the parties are such 'that one of the parties is in a position to dominate the will of the other.' It is clear therefore that there is this idea of 'will' in consent, and that when the will is dominated it is not considered to be a real consent: this is also expressed in the note to s. 14. "On the other hand, there may be such force or fraud as to exclude the notion of will and to make the transaction void, as not being the act of the person to whom it is imputed."^(b)

The expression 'dominate the will' makes it necessary to explain what is meant by 'forcing the will.'

Meaning of 'forcing the will.' You cannot by compulsion cause a volition in another man, but you may lead to it: the psychical conditions of volition can be suppressed so that it becomes impossible for a man to decide for himself for this and not for that. As Mr. Bradley says ^(c): "If a pistol is suddenly presented at my head what I do before I have time to collect myself, may not be imputable to me at all given extreme terror or great bodily weakness or some abnormal state of mind, a deed may be done on compulsion, not only without conscious will, but also without the possibility of it." But further

(a) Pollock, Principles of Contract, 7th Edn., pp. 3, 5.

op cit., p. 53.

(c) Bradley, Ethical Studies, p. 41.

(b) Cunningham and Shephard,

than this when we do know what we are doing, but not so far as to perceive it in relation to other things, we do not collect ourselves and do not know the deed in its specific character. "For instance, if a woman is to sign some document which may be a gross wrong upon her children, she, I suppose, may be so frightened by violence, that she signs, knowing that she is signing, but not at the moment knowing anything but that she is signing." And lastly when I know what I am doing and also know the quality of it, know the relation in which it stands to the rest of my life and know that it is wrong, even here, if I cannot collect myself so as by conscious volition to decide one way or other, my will is forced. If force is put upon me, whether proceeding simply from an uncontrollable element of my nature, or in addition, from a will outside me, so that volition becomes a psychological impossibility, and where it is not my fault that it is so impossible, I am not responsible. Such cases occur with the insane and with some people whose energy has been destroyed by violent physical pain and great weakness or under the influence of violent emotion.^(a) Further remarks on this subject will be found under the heading 'Responsibility.' At the same time 'consent' is not synonymous with will, and there are cases of consent in which the person consenting does not go so far as to do any act. There is here merely the mental attitude of one agent towards the act of another: he simply abstains from resistance and that is all. Mr. Bradley maintains^(b) that all consent, whether tacit or expressed, is given in the end to a foreign will. But such consent does not make a man the real doer of the act in question, and therefore stops short of volition: for you cannot get rid of the idea of the foreignness of the will from which the act proceeds, and if consent passes into an attempt to further the act or commit it in common, it has ceased to be mere consent.

We are inclined to think this is rather over-refining at all events for the purpose for which we are seeking to define consent, and

(a) Bradley, *Ethical Studies*, p. 42.

(b) *Mind* N. S., pp. 158-160.

prefer to retain the view that consent carries the will with it. The difficulty of fixing the mental state of consent lies mainly, as he observes, in knowing the exact nature of that to which at the moment consent is given : for the consent is given to something as it appears at one moment to the consentor, and as at that moment it is qualified by his feelings. But the exact nature of such an impression as it happens in another, can be arrived at only by approximation and always presumptively. The same reason will explain, why persons will afterwards often deny that they consented to a thing, to which they really gave their consent at the time : especially is this the case in prosecutions for rape, where the prosecutrix doubtless sometimes really does believe subsequently that she did not consent to the sexual intercourse at the time. With a change of feeling things appear to her in a different light.

To return then to the question of voluntary confessions, it appears to us that in few cases can it be said that the prisoner's will is forced in any of the senses indicated above, and that there is, at all events in India, (a) too wide a tendency to discredit such statements on the ground of their involuntariness ; and we must repeat that if the prisoner assents to a suggestion it may be, and probably usually is, a voluntary act on his part. For the kind of definition that we are seeking will be arrived at by considering not what must be absent but what must be present for voluntary decision, and this is said by Prof. Stout to be the intervention of self-consciousness as a co-operating factor. By this is meant that the agent must mentally realise the bearing of the contemplated course of action on his interests as a whole, (b) but how that course of action is suggested to him is immaterial.

Indeed it is doubtful whether notions of inducement and involuntariness are not mutually incompatible, and therefore whether it would not be better to altogether dissociate such grounds from one another and to regard them as separate reasons

(a) See, *e.g.*, the various dicta of Indian Judges quoted on page 201, Ameer Ali and Woodroffe, *op cit.*,

(b) Stout, *Groundwork of Psychology*, pp. 232-3.

for holding confessions to be inadmissible. We cannot, however, undertake to discuss 'inducement' here, for when it is said to be "a term which is extensive enough to include torture,"^(a) and again that it "need not be expressed, but may be implied from the conduct of the person in authority. . . . or the circumstances of the case,"^(b) it appears to us to cease to have any distinctive meaning.

9. There is perhaps no branch of the law—unless it be that of breach of promise of marriage—
 Intention in Libel and Defamation : (a) which is regarded by the outside man as so
 in English Law. uncertain and unsatisfactory in its application as the law of libel and defamation. We believe this to be due to the fact that the defendant finds himself credited on many occasions with intentions which he never had, and the reason of this is partly the extraordinary use of the legal term 'malice' in English law and partly the unqualified employment of the doctrine that every man must be taken to know and therefore to intend the natural results of his words.

Libel in English law consists in maliciously publishing defamatory matter of any person, and "malice" in its legal sense means a wrongful act done intentionally and without just cause or excuse. "From the nature of the case the publication of a libel must be an intentional act."^(c) There is a step in the argument here which is slurred over : the reasoning is that, because a wrongful act is done intentionally, therefore the wrong must have been intended and in consequence the wrongful intention may be inferred from the mere act itself. But in order to prove that the act was *wrongful* in the first place some intention on the part of the doer is really needed to be shown : the mere physical act or the mere utterance of the words does not in itself prove a wrongful intention, and it is only by resorting to the plan of inferring intention entirely from results, that you can argue that because an act produces harm to the

(a) Ameer Ali and Woodroffe, *op cit.*, p. 200.

(b) *Ibid.*, p. 204.

(c) Stephen, Digest of Criminal Law, 3rd Edn, Arts. 267, 271 and note 2 to that Art.

complainant therefore the accused intended that harm, a conclusion which may be altogether erroneous. The argument is in fact a circular one when closely examined. "The law always presumes a wrongful intention as accompanying a 'wrongful' act without any proof of malice:" (a) 'wrongful' is what is forbidden by law, but the criminal law (and we are here concerned with a criminal offence) does not create offences without reference to intention: as Sir J. F. Stephen himself says in his *General View of the Criminal Law of England*: "No action is criminal in itself unless the intent, the mental element of it, is a state of mind forbidden to the law." (b)

Part at least of the offence is due either to a wrong intention or the lack of a right intention in the matter, and therefore when a 'wrongful' act is spoken of there is a tacit assumption made that there has been a wrong intention displayed in the case. To say therefore that from a wrongful act the law presumes the intention is in reality to assume—without first proving it,—a wrong intention accompanying the act and then to infer a wrongful intention from itself as so assumed: there is thus no real inference at all from the nature of the act itself, but the conclusion is begged from the outset by the use of the word 'wrongful.'

The legal sense of 'malice,' as it is termed, is in effect a device to abolish the question of intention altogether in libel cases, as is openly stated, *e.g.*, by Lord Esher in the following: "If the matter stood there without more the law would infer malice, the meaning of which really is that it does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not;" (c) and again: "The judge ought not to leave to the jury whether the defendant intended by a libel to injure the plaintiff. Every man is presumed to intend the natural and ordinary consequences of his act. | If the tendency

(a) *Bromage v. Prosser*, 4 B. & C., at p. 255.

(b) Stephen, *A General View of the Criminal Law of England*, p. 81.

(c) *Nevill v. Fine Arts Insurance Co.*, quoted on p. 875 of *Mayne's Criminal Law of India*.

of the publication was injurious to the plaintiff, the law will assume that the defendant, by publishing it, intended to produce the injury which it was calculated to effect.”(a)

The law has in fact succeeded in depriving ‘malice’ of all meaning, and it might just as well be omitted from the definition of the offence of libel : at the same time as you cannot in practice divest words of their natural meaning, (b) it has not been altogether consistent in its use of the term and it has to admit occasional failures. It is laid down (c) that it is not libel to publish an extract or abstract of Parliamentary proceedings if it is shown by the party accused that such extract or abstract was published *bonâ fide* and without malice. Here ‘malice’ must clearly be given some positive meaning, and the learned author of the Digest accordingly remarks : “the word ‘malice’ must have its popular sense. In this connection, however, it has almost no meaning. A publishes an abstract of a parliamentary paper, which destroys the character of his deadly enemy B. He rejoices in the prospect of ruining B’s character, and so publishes both *bonâ fide* and with malice. It is absurd to say he is indictable, yet, if he is not, what is the sense of the word ‘malice’ ? It seldom has any meaning except a misleading one. It refers not to intention but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. Another objection to it is that its popular meaning is not barely ill-will, but an ill-will which it is immoral to feel. No one would describe legitimate indignation as ‘malice.’ The word is entirely avoided in the Indian Penal Code.”(d)

We cannot regard this note as satisfactory, but all that we desire here to point out is that it is an open admission that the legal sense of malice is not always adhered to, but the word is sometimes given its popular sense even in law ; that the term ‘malice’ is a misleading one, and is apparently on that account avoided in the Indian Penal Code.

(a) *Haire v. Wilson*, quoted *ibid*, p. 876.

(b) See p. 21.

(c) Stephen, Digest, Art. 275 and note 3 thereon.

(d) Note 3 to Art. 275.

But surely there is something wrong when a word which has a definite and well-understood meaning in the English language is adopted for use in our law, and then given an avowedly different meaning which it is found cannot be adhered to, and is finally stigmatised as a misleading term, and definitely discarded on that account from a newer branch of law. It is proclaimed that "In the English law of libel, *malice is said to be the gist of action for defamation*;" (a) and again "according to English law 'it is for the defendant to prove that the occasion was privileged. If the defendant does so, the burthen of showing actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice.' The reason of this is that in English law *the essence of the offence is an intention to do a wrongful act*:" (b) yet when the meaning given to 'malice' comes to be interpreted, it is found to be either misleading where it is not used in the legal sense, or, when used in that sense, practically non-existent: at least the term is so far deprived of any meaning that concerns intention that with the aid of the legal presumption above referred to, it might be excised from the definition of the offence without any difference to the result arrived at. The unsatisfactory state of the law and the confusion arising from the employment of such terms as 'implied malice,' 'express malice,' 'actual malice,' 'malice in fact,' etc., is recognised, *e.g.*, by Sir J. F. Stephen, (c) but these writers do not appear to perceive that the true cause of the trouble has been the attempt to evade a real decision as to the intention of the defendant, by employing a short cut in the shape of a legal presumption which claims to be of universal validity but which is in fact inapplicable to cases of this kind. This inapplicability is demonstrated here by the fact that having assigned to malice an impossible meaning, even when assisted by the doctrine in question, our lawyers have then been compelled to introduce an 'actual' or 'express malice,' which is nothing more than malice in its popular

(a) *Wason v. Walter*, L. R. 4 Q. B., 73, at p. 87.

(b) *Mayne, op cit.*, p. 887.

(c) See Note X, pp. 383-5 of the Digest.

sense, in order to oppose their own legal conception and counteract some of the injustice which it worked.

10. As the difficulties with regard to malice are recognised by English legal writers, and it is made a (b) in Indian Law. matter of congratulation that the word has been altogether avoided in the Indian Penal Code, one would imagine that special care would be taken by commentators and judges to see that the Indian law of defamation did not become entangled with the English law of libel, and that the confused notions of the latter were not introduced into the interpretation of the former. The actual definition in the Code lays stress on intention, running as follows:—"Whoever by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe, that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person." (a)

What, however, do we find? If one turns to Mr. Mayne's Commentary on the Code as soon as he undertakes to explain intention to injure, we find immediate appeals to decisions in English law and introduction of the doctrine of malice, and our commentator sets himself to show that the English and Indian laws are the same. After quoting several of such decisions he concludes as follows (§ 667):—"It seems to me that there is nothing in the language of the Code which leads to any different conclusions. When a defendant says that he did not intend to damage the reputation of the prosecutor, what does he mean? Does he mean that he did not intend by his language to convey anything that would harm the character of the prosecutor; or that he was justified in saying what he did, but that his object was not to injure the complainant, but to discharge a duty; or, that in using language of a defamatory nature, he had no wish to hurt him, and did not suppose he would be hurt? It is obvious that in the first case

what he really asserts is that a false construction has been put upon his words. *Primâ facie* a man's words must be judged according to the meaning which is ordinarily put upon them. . . . Again, a man who speaks will be judged according to the effect produced on those to whom he speaks. He is not answerable for the effect produced on those to whom his words are repeated, unless he intended them to be repeated, or addressed them to a person whose duty it was to repeat them. . . . In all such cases the real defence is that the words used had not a defamatory meaning, and before there can be a conviction this defence must have been negatived by those upon whom the decision depends. The question of intention, as an independent line of defence, can, in this point of view, never arise. . . . The third line of defence is obviously untenable. It is not necessary to show that the defendant intended to hurt the man he maligns. It is sufficient under the Code to show that he knew or had reason to believe, the imputation would do harm. This must be judged of by the nature of the act done, just as if the accused had stabbed the prosecutor with a knife. As Sir James Stephen says: "I don't think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." (a)

It is not our intention to repeat here all that we have said against the legal presumption that a man must be taken to intend the natural consequences of his act or, rather here, of his words : what we wish to point out is that the application of this presumption has the effect of throwing the burden of proof on the accused straight away, just as the legal presumption of malice in English law assigns to the defendant at once a wrong intention, merely because of the results of his words. When it is glibly said that '*primâ facie* a man's words must be judged according to the meaning

(a) Mayne's Criminal Law of India, 2nd Edn., pp. 875, *et seq.*

which is *ordinarily* put upon them', it does not seem to be comprehended that there is no standard by which it can be judged what the ordinary meaning is, and that every circumstance under which such words are spoken are particular circumstances which go to make the meaning of the words. There is no such condition as that of general or ordinary circumstances which impart no special meaning to the words, but leave them colourless and intelligible to a man of no particular characteristics who represents the disinterested observer of the piece. This view is a fiction of the law which no psychologist could for a moment entertain, and we have, in our opinion, exposed its sham character, in our chapter on the Normal Man.(a) That his standard of 'the meaning ordinarily put upon them' is not one that can be trusted or readily applied is in fact illustrated by Mr. Mayne's own work, for he has no sooner announced his method than he proceeds to fill up the rest of the page with instances that are exceptions to it ; these instances are simply particular cases in which the words spoken have not the meaning 'ordinarily put upon them,' and we do not suppose him to imply that the exceptions are limited in number to those which he here quotes. Further, the dictum of Sir James Stephen, we may remind him, does not say that a man's intention is to be discovered by considering what must have appeared to an ordinary man at the time the natural consequences of his conduct, but what must have appeared to the agent himself. This is to be collected, we presume, from what the man not only did, but also said at the time, and by a consideration of the man's temperament, education, etc., and his own explanation of the matter. To take the ordinary man and say that he is equivalent to the individual in this particular case, apart from the difficulty of constructing the ordinary man, is to neglect all that goes to make up the individual and to force on him the task of proving that he is something else than he has, for no reason at all, been arbitrarily assumed to be.

Having adopted this unconscionable method of discovering intention, and created, so to speak, a meaningless intention which

corresponds to malice in the legal sense, as used in English law, exactly the same result follows, *viz.*, that an 'intention' with some meaning in it has to be subsequently introduced into the Indian law of defamation in order to counteract the effects of the legal construction. Explanation 1 to s. 499, I. P. C., is as follows :—" It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of the family or other near relatives." The words 'knowing or having reason to believe, etc.' do not occur here and so Mr. Mayne is constrained to explain as under (§ 668) :—" In order to bring within the terms of this section defamatory matter relating to a deceased person, it will be necessary to show, not only that the deceased might have complained of it, but also that it was written, or spoken, with the intention of insulting his surviving relations. *I conceive that the words 'intended to be hurtful, etc.,' in Explanation 1, must be taken as meaning an express and primary intention, as distinguished from a legal and implied intention.*"

We thus have now an 'express intention,' a 'primary intention,' and an 'implied intention' corresponding to the 'express malice,' 'actual malice,' and 'implied malice' of English law, and so although the word 'malice' may have been carefully excluded from the Indian Penal Code by the Legislature through the ingenuity of our commentator it has been brought back again in a different dress together with all the confusion that it involves. The mistake appears to us to be the introduction of the idea of 'implied intention,' which cannot be consistently adhered to, and indeed it seems this interpretation of intention is lightly thrown over when it proves inconvenient. Thus we find (§ 689) :—" Under the Penal Code a person is only liable for making or publishing an imputation when he does so 'intending to harm, or knowing or having reason to believe' that such imputation will do harm. *These words cannot mean less than the wilful intention to do a wrongful act, or the connivance at, or tacit permission to publish libels of the sort complained of, which would amount to an authority to publish*

any particular libel.”(a) We ask the candid reader whether such expressions really do convey to him the same meaning as the ‘implied intention’ of the above doctrine, and, if not, whether it is not now plain to him why, amid such a wilderness of interpretations of the mental states as he has just been through, the hapless accused is himself at a loss to know whether he has or has not committed a criminal offence? But there is a legal maxim ‘*ignorantia juris non excusat.*’

(a) *Mayne, op cit.*, p. 906.

CHAPTER IV.

MEMORY.

Importance of Memory—Memory distinguished from Retentiveness, Recognition and Fancy—Conditions of Memory—Varieties of Individual Memory—Effect of Emotion on Memory—Exceptional Memory displayed in certain Pathological States—Power of Imaging in Memory—Necessity of an existing cause to awake Recollection—Remembrance of familiar objects—Marks as aids to Memory explained—Reasons cannot always be given for Recollection—Memory and Inference—Various Aids to Recollection—Refreshing Memory by written Memoranda—Memory and Feeling—Illusions of Memory and their Causes.

NOTE on a view of Memory founded on the transmission theory of Consciousness.

“THE capacity of a party to give a faithful account of things depends on,¹⁾ says Best, . . .

Importance of memory. “4. His memory; and here, whether the transaction is ancient or recent, whether his recollection has been refreshed by memorandum, conversation, etc.”(a) This admits the importance of memory but hardly seems an adequate treatment of the subject: yet it is practically all that is to be found about it in the volume. We shall enter into the matter more deeply and shall begin by distinguishing memory from certain other mental states.

In the first place, although memory is used as the general name, it is not the same as Retentiveness: in memory there is necessarily some contrast of past and present, in Retentiveness nothing but the persistence of the old.(b) Again, though it includes Recognition, Recognition as such does not include Memory in which there

Memory distinguished from other states.

(a) “Best on Evidence”, 9th Edn., nica, 9th Edn., Vol. XX, art. Psychology, p. 14. p.47.

(b) J. Ward, Encyclopædia Britan-

is also remembrance of the time and circumstances in which an impression, piece of knowledge, etc., was acquired. When we find ourselves suddenly reminded by what is happening of a preceding experience exactly like it, if we are unable to assign to such representation a place in the past, instead of a belief that it happened there arises bewilderment.(a)

We distinguish Imagination from Memory because in the former there is no Recognition, and because of the fixed order and position of the ideas of what is remembered or expected as contrasted with the liberty of the imagination to transpose and change its ideas : at the same time the machinery of memory must be largely determined by men's powers of imagining which differ greatly, as will be explained later.(b) The usual distinction between Fancy and Memory is that memory-images are ideas which exactly reproduce some previous perception, while fancy-images consist of a combination of elements taken from a whole number of perceptions, but Wundt refuses to accept this on the ground that you never do get such memory-images : we never represent exactly but always leave out much and add much that was not there, and ideas are never twice alike. He explains fancy as due to indirect association of ideas, the secondary ideas being there but not perceived.(c)

In the present chapter, unless it seems specially called for, no precise distinction will be observed between Memory and Recognition, and Retentiveness will be treated as the basis of Memory.

A man's native retentiveness depends on the brain tissue and is unchangeable. "No amount of culture," Retentiveness. says Prof. James, "would seem capable of modifying a man's 'General Retentiveness.' This is a physiological quality, given once for all with his organization and which he can never hope to change. It differs no doubt in disease and health . . . it is better in fresh and vigorous hours than when we

(a) J. Ward, *Encyclopædia Britannica*, 9th Edn., Vol. XX, art. Psychology, p. 63.

logy, Vol. I, p. 684.
(c) Wundt, *Human and Animal Psychology*, pp. 289, 306-7.

(b) W. James, *Principles of Psychology*.

are fagged or ill.”(a) At the same time retentiveness is affected in other ways which we shall now proceed to consider as the conditions of memory.

2. The following are some of the mental conditions of memory. *Firstly*, as regards the circumstances of the moment of the original appearance, it depends on (a) the degree of impressiveness of the original experience, *i.e.*, the amount of interest it awakened and of attention it excited. But (b) the absence of impressiveness may be made good by a repetition of the actual experience or by the fact of previous mnemonic revivals. Time and Repetition are required for memory to be established. (c) Our state of health and general vital power affects our ability to take in impressions. (d) The presentative element must have intensity and distinctness and also sufficient duration. *Secondly*, as regards the moment of the re-appearance: here the pre-existing mental conditions and association of ideas are the important matters. Every recollection is determined by some link of association, which may be either of contiguity or similarity, *i.e.*, the original experiences may have occurred at the same time or in close succession, or the sight of one place or person recalls that of another place or person.

Again, a fresh and healthy brain is also required for reproduction, and we are also influenced by our emotional states, while much depends on the nature of the memories themselves. The more simple and less complex easily disappear, and those which have many strongly marked and distinctive sides are better retained. We are further aided by the recency of the occurrence and our own powers of imagination.(b)

The above is a mere summary and not intended to be exhaustive: it will be both amplified and supplemented in the course of the following pages under various heads.

(a) James, *op cit.*, Vol. I, pp. 663-4.

(b) Sully, *Illusions*, p. 236; *Outlines*

of Psychology, p. 175; Höfding, *Outlines of Psychology*, pp. 148, 150.

3. No one will probably dispute that different men have different powers of memory, but the point to which we now wish to draw attention is that there are different kinds of memory. For we conceive that there cannot be a greater mistake than to assume that we can judge off-hand of the possibility of an alleged act of remembrance, either by reference to our own powers or to a supposed average power of recollection, or again that we can be at all sure of how much any man can be reasonably expected to remember under any particular circumstances. We are aware that such estimates are confidently made by judges and advocates in spite of the statements of witnesses that they do actually recollect more or less than is supposed to be possible or reasonable, and the more we have studied memory and all that affects it, the less we feel disposed to accept the sceptical views of the law courts concerning it.

The varieties which we are about to speak of are pure individual differences of memory. "Idiosyncracies are however frequent," says Dr. Ward, "thus we find one person has an exceptional memory for sounds, another for colour, another for forms." (a) The kinds of images employed in memory are as numerous as the different kinds of sensations, *viz.*, visual, auditory, tactile, motor, etc.: we may use them singly or cumulatively, but each has his own habits and according as visual or auditory images predominate with him, he will have a good memory for sights or sounds. The indifferent kind are those in whom one type of memory is equal to another. (b) "The statistical investigations of Mr. F. Galton," says Prof. Sully, "into the nature of visual representation, or what he calls 'visualization' go to show that this power varies greatly among individuals (of the same race), that many persons have very little ability to call up distinct mental pictures of such familiar objects as the breakfast table." (c) It also varies with race, sex and age.

(a) J. Ward, *op cit.*, p. 61. Sully, *op cit.*, p. 13.
 Outlines of Psychology, p. 217.

(c) Sully, *op cit.*, p. 174.

(b) Binet, Psychology of Reasoning,

It seems to us plain that the power of recollecting a scene will depend very much on a man's power of visualization, and if one who has got this power judges one who has not, or *vice-versa*, his estimate of the truth of the latter's statements is likely to be very erroneous, unless he has some psychological knowledge of memory.

Apart from the kind mentioned above, there are yet other differences of individual memory as to which the following may be quoted: "Speaking generally and disregarding individual differences, we may say that the higher the sense in point of discriminative refinement the better, *i.e.*, the more distinct and complete, the corresponding power of reproduction. Thus of all presentations visual percepts are recalled the best: then come sounds, touches, tastes and smells." Individual differences of memory depend on "(1) special sense-discrimination to start with, and (2) special interests and habits of attention leading to greater depth of impression and better association in the case of particular groups of presentations." (a)

We recollect to have seen it stated more than once that an uneducated villager could not possibly have remembered all he stated in court and has clearly been taught by the police or the headman of the village or by whoever can conveniently be made the villain of the piece: we would therefore warn the reader that there are no valid grounds for attributing bad memory to uneducated persons. (b) We do not suppose that a similar dictum would be accepted if the witness were a philosopher or a mathematician, yet it is a psychological fact that savages and uneducated persons have more powers of visualising than persons whose interests are rather in the abstract: but there is also another reason. Where the range of interest is narrow, it is concentrated, and, as pointed out in the case of the idiot, the memory is therefore likely to be exact within the limits of observation. Good memory is partly due to the interest we take in a matter and partly mechanical, and the educated rarely

(a) Sully, *op cit.*, pp. 216-7.

(b) Stout, *Manual of Psychology*,
p. 425.

have the latter kind because they have developed the former at its expense : high mental power is seldom combined with good mechanical memory. You may see sometimes how well ponies remember a road because they do not think as they go along and so the landmarks are the only things impressed on them : the savage is a modified instance of the same kind. That he should have an excellent memory of the mechanical kind might have been suggested by the way that Homer's poems and other long epics have been handed down correctly by quite uneducated persons.

As the mechanical memory depends on the juxtaposition of events in space and time as opposed to the memory which depends on intelligent interest, there is nothing surprising in the fact that a Burman villager remembers whether he went to the right or left or whether this or that person was facing north or south, for these are the kinds of questions which many advocates ask, although he may be relating events which happened long ago.

4. Allusion has already been made to emotion as influencing

Effect of Emotion
and similar condi-
tions on memory.

memory. There is a mistaken impression that fear prevents attention to what is going on and therefore hinders memory, and it has been argued before the writer more than once that a narrative or an identification is not reliable because the witness being frightened at the time could not have noticed or recollected what she states. This is a frequent incident of a dacoity or robbery case. It is well, therefore, to state exactly what the effect of fear is. It may be that the fear is so great as to totally paralyse the mind, as *e.g.*, when the serpent fascinates its prey, and in such cases the argument would have foundation : but this is rarely so, and usually a person under its influence observes better and remembers clearly. Nor is this strange if we realise the character of emotion. "Fear," says Darwin, "is often preceded by astonishment, and is so far akin to it that both lead to the sense of sight and hearing being instantly aroused."(a) It leads us to attend minutely to

(a) Darwin, *Origin of the Emotions*, p. 290.

everything around us because we are then specially interested in them, as they are likely to intimately concern us. So Bain says "With regard to the intellect the characters of the emotion are very marked. The concentration of energy in the perceptions and the allied intellectual trains gives an extraordinary impressiveness to the objects and circumstances of the feeling. In a house believed to be haunted every sound is listened to with avidity ; every breath of wind is interpreted as the approach of the dreaded spirit : hence for securing attention to a limited subject, the feeling is highly efficacious."(a)

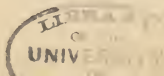
To the same effect again Prof. Sully says : " The essential element in interest is feeling, and any marked accompaniment of feeling, whether pleasurable or painful, is, as we all know, a great aid to retention. Thus the events of our early childhood which we permanently retain commonly show an accompaniment of strong feeling, more particularly perhaps that of childish wonder at something new and marvellous, whether delightful or terrible. The effect of disagreeable feeling in fixing impression is illustrated in the retention of the image of an ugly or malevolent-looking face, of words in a foreign language which have disagreeable sensations," etc.(b) And again " Differences in emotional condition, which appear to involve variations in the energy and rapidity of brain action render us much more impressionable at some moments than at others. As more than one novelist have illustrated, moments of intense feeling appear to raise the plastic or acquisitive powers of the brain to a preternatural height, so that small and insignificant details of the objects happening to present themselves at the moment are permanently reflected in the mirror of the mind."(c)

Speaking of the influence of emotion on the thoughts the same writer says : " Emotion as cerebral excitement is in its less agitating degrees distinctly promotive of ideation. We never have in

(a) Bain, Mental and Moral Science, p. 234.

(b) Sully, *op cit.*, p. 176,

(c) *Ibid.*, p. 177.



our cooler moments such a swift rush of ideas as we have in moments of emotional excitement. This exhilarating effect is, of course, seen most plainly in the case of pleasurable emotion, but it is not wanting in the case of painful emotion, provided it is confined to the stimulatory pitch and is not allowed to become prostrating.”(a) He then points out that great emotion tends to colour or give a particular direction to the ideas of the time, a fact also noted by Professor James as follows :—
 “ When any strong emotional state whatever is upon us the tendency is for no images but such as are congruous with it to come up. If others by chance offer themselves they are instantly smothered and crowded out.”(b)

There is then this danger, for it will equally affect our recollection of events, but apart from this, the effect of fear, so far from hindering recollection, is to aid it by giving exceptional vividness, distinctness and persistence to the images called up at the time.

Exceptional memory is also displayed in certain pathological states which are akin to emotion, especially the hypnotic : instances are given by the authors of *Animal Magnetism* who, further remark “ the acuteness of the memory during somnambulism without absolutely justifying those who assert that nothing is lost to memory yet shows that its *conservative* power is much greater than is supposed, when measured by the capacity of reproduction or recollection. It proves that in many cases in which we believe that a certain fact is completely effaced from the memory, this is by no means the case ; the trace of it is there, but the power of recalling it is wanting ; and it is probable that under the influence of hypnotism or of some excitement to which we are sensitive, it would be possible to revive the apparently extinct memory of the fact in question.”(c) So also Professor James concludes as the result of certain pathological evidence of brain-diseases and hypnotic cases : “ All these pathological facts are showing us that the

(a) Sully, *op cit.*, p. 341.

(b) James, *op cit.*, Vol. II, p. 563.

(c) Binet and Féré, *Animal Magnetism*, pp. 136-7.

sphere of possible recollection may be wider than we think, and that in certain matters apparent oblivion is no proof against possible recall under other conditions.”(a) Professor Sully’s remarks on the same point also deserve quoting : “ The stage of complete obliscence is supposed to be reached when no effort of will and no available aid from suggestive forces succeed in effecting the reproduction. In order however to determine that a fact is thus irrecoverably forgotten, we ought first to have tried the maximum force of the reproductive agencies and this is often out of our power. The addition of the stimuli of locality, sound of voice and so forth, might serve to recall images of persons which are now apparently irrecoverable. The remarkable revival of remote and seemingly lost impressions in dreams and in certain forms of brain-derangement suggest that much which we suppose to be forgotten might, *under the most favourable conjunction of conditions*, be recovered.”(b)

Some readers will remember that such an experiment was made in Wilkie Collins’ story, “The Moonstone.” We wish we had space to quote here some of the pathological evidence in question, as it would certainly convince doubters that abnormal powers of memory have been displayed under such conditions ; and, if this be so, in view of the fact that we cannot, in the present state of our knowledge, define the conditions of its display, we should have more hesitation in classing as impossible what appear to be abnormal recollections under ordinary circumstances. Nor again, because a witness once says that he cannot recollect a person or an event, does it follow that he will do not so afterwards under other circumstances : according to the author’s experience, as evidence is at present received, it is quite sufficient for a man to have failed once to recollect, to be instantly discredited if he subsequently professes to remember ; yet the inference that he is not speaking the truth in such a case, may clearly in the light of the above facts be quite erroneous.

(a) James, *op. cit.*, Vol. I, p. 682.

(b) Sully, *op. cit.*, p. 215.

5. It is not necessary however to appeal to pathological evidence to explain sometimes how it can be that a man may honestly recollect after stating his inability to do so, for we are often able to identify an object, as a face, when we actually see it, without having any corresponding power of imaging it when it is absent. The lower animals which have at best only a rudimentary power of imaging, often display a marvellous power of recognising.^(a)

This important point is not sufficiently understood : it is a common practice to ask a witness to describe a person, an article of jewellery or clothing, &c., before he or it is shown to him, and, if he fails to give an accurate description beforehand, to regard it as a proof that the identification is not genuine. No doubt such a description would be a valuable confirmation of his statement, but the failure to give one may plainly be no proof of its falsity, being simply due to the lack of power to visualize, concerning which we have already spoken.

In the absence of such power it is not plain how such a description could be expected, and indeed the expectation seems to betray some ignorance of the process of memory, which is also illustrated by the following examples. The writer remembers a High Court judge remarking in a dacoity case in which a woman professed to have identified one of the dacoits who was previously a stranger to her, that he did not believe her for one reason because she had not said at the time of the dacoity that she would be able to recognise any of them : and yet had she made the statement he desired it would have been quite worthless. For in memory we only know retention through the fact of revival : what this woman perceived at the time was subsequently reproduced under the new form of an image, and the immediate conditions of the appearance of the image was the recurrence in some form of that mode of central excitation which conditioned the

Necessity of an
exciting cause.

(a) Sully, *op. cit.*, p. 172.

original impression. But this learned judge wished the poor woman to say beforehand what she would not know until the cause capable of exciting the image had been presented to her.

In a second case, *viz.*, one of kidnapping in which a mother was testifying as to the age of her daughter the advocate for the defence questioned her as to whether she could remember the names of any other children who were born in her village in the same year which she could not do. Now in the first place we remember what we are interested in, and the woman was presumably not interested in the other children, but apart from this the cross-examination was conducted on a totally wrong principle so far as memory was concerned : for the woman's daughter was present in court and she was thus an exciting cause to revive the impressions in the mother's brain, whereas the advocate neither produced any other woman from the village nor even mentioned her name, so that there was no reason why the witness should remember anything about anyone else. He simply ignored the fact that there is needed in ordinary cases the presence of something to remind us of the object, or to suggest it to our minds.

The same case further leads us to note the importance of familiarity as an aid to memory : here we

| | |
|-------------------------------------|---|
| Remembrance of familiar objects. | have both interest and repetition combined. |
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“What we can recollect instantly and without conscious effort, is either included in, or firmly attached to, our permanent surroundings, dominant interests and habitual pursuits. Thus we can at any time recall without effort the scenery of our home, or place of business, the sound of a friend's voice, the knowledge we habitually revert to and apply in our daily actions, our profession and our amusements.”(a) This no doubt is generally known, yet in spite of it, many magistrates will entirely refuse to accept the identification of his paddy by a cultivator who has grown it or of his jacket or cooking pot by a villager, although these are to him articles of most familiar use :

(a) Sully, *Ibid.*, p. 214.

to the magistrate, because there are no associations of ideas connected with these things in his mind, they cannot be identified in the absence of some distinct mark, and he has not sufficient imagination to put himself in the villager's place.

Since so much importance is usually attached to the existence of marks as aids to memory, we must devote a few words to this subject. Psychologically considered such marks are merely

Marks as aids to
Memory.

reasons for the recollection, and it seems a legitimate question why do we always want a reason, *i.e.*, something intermediate, as an explanation of memory? If a man recognizes a coat he must mention a mark, if he recollects a date he must mention some approximate event to prove it, &c. But why again does not the same feeling recur as to the mark, event, &c., and so on, *ad infinitum*? To understand this it is necessary to grasp the theory of association of ideas by similarity and contiguity, and the explanation of what is known as the feeling of Recognition.

There are two fundamental forms of connection between ideational elements: connection by likeness and connection by contiguity, and both are concerned in every case of actual association. There is a direct connection of like elements of different ideas, one recalls the other, and then a connection attaches itself immediately to this of such elements of previous ideas as have been externally contiguous to those like constituents: if, as we look at the total result, the connections of the like elements are predominant, we speak of a similarity association, if the external connections are the stronger, of a contiguity association. (a) In cognition the presented and the memorial elements combine at once to a single idea, referred to the actual impression, and from cognition Recognition is developed as follows. In immediate recognition we are either unconscious or but obscurely conscious of the connecting links by whose aid recognition is

(a) Wundt, Human and Animal Psychology, pp. 296, 297. (The writer is aware there are other expla-

nations of association of ideas, but he cannot discuss them in a work like the present.)

effected : we may be merely conscious that we have had the idea before without there being any recollection of the attendant circumstances, or, although the recognition is immediate, we may also recall the temporal relations and spatial surroundings in which we previously made the acquaintance of the recognized object. Now it is only when we consciously localise the recognized idea in time and space that we get the feeling of recognition ; the act of recognition requires these contiguity connections for its completion.(a)

Immediate recognition furnishes the transition to mediate recognition, where we are clearly conscious that recognition is brought about by the mediation of secondary ideas, such as the marks, events, &c., spoken of above. On this point we will quote Wundt's words : "Think how often you meet a person whom at first sight you take to be an absolute stranger. But he tells you his name, and on a sudden the face that was so unfamiliar shows you the features of an old acquaintance. Or there may be other mediating circumstances. You see a third person whom you have often noticed in his company, and your eyes chance to fall on a coat or a travelling bag that awaken your memory. Here again there is a special feeling regularly associated with the act of recognition. This feeling comes later and arises more gradually than the immediate recognition feeling. At the same time you will find that it may be very vivid even when the apprehension of the agreement between the present idea and previous one is still quite indefinite."(b)

Now Wundt's view is that in every case of recognition, mediate or immediate, secondary or auxiliary ideas are in fact employed, but in the former case they are perceived first and the agreement of the two principals afterwards, while in the latter they are perceived at the same time only as the agreement of the principals or even later : but in every instance the *feeling* of recognition depends upon the excitation of auxiliary ideas.(c)

(a) Wundt, *Human and Animal Psychology*, p. 298.

(b) *Ibid.*, p. 299.

(c) *Ibid.*, pp. 300-1.

The importance of marks, proximate events, &c., as auxiliary ideas producing the feeling of recognition is thus plain, and it is not necessary to go back and seek again further marks or events to confirm these, because as soon as we have by their aid consciously localised the past impression in time and space, we have got the feeling of recognition that we require and are satisfied. Professor Sully gives the physiological explanation of this feeling thus : " when a particular central element or cluster of elements is re-excited to a functional activity similar to that of a previous excitation, this new excitation is somehow modified by the residuum of its previous activity or surviving 'psychological disposition.' This modification is the only assignable nervous substrate of the consciousness of familiarity or recognition." (a)

We must, however, insist that reasons for recollecting events cannot always be given, and it is dangerous to press native witnesses for them, as it only results in their inventing some transparently fictitious explanation, which tends to discredit them unnecessarily. There is nothing strange, as some advocates seem to think, in witnesses recollecting some events and not others, for our memories restore to us only fragments of our past life and often what now seems to us only insignificant details of a scene or incident : as the above quoted writer says : " It seems quite impossible to account for these particular revivals, they appear to be so capricious. When a little time has elapsed after an event and the attendant circumstances fade away from memory, it is often difficult to say why we were impressed with it as we afterwards prove to have been. It is no doubt possible to see that many recollections of our childhood owe their vividness to the fact of the exceptional character of the events ; but this cannot always be recognized. Some of them seem to our mature minds very oddly selected, although no doubt there are in every case good reasons, if we could only discover them, why those particular

(a) Sully, *Outlines of Psychology*, p. 106.

incidents rather than any others should have been retained.”(a) One reason, however, is suggested by Prof. Hoffding’s remark that ‘that which has escaped the memory may still indirectly through its after-effects exercise a great influence on our conscious life, but is no longer a part of it.’ Nor is it strange that we should be able to remember an event without being able also to assign a positive reason for our recollection, if we understand the nature of nascent or implicit revival. Past experience sometimes works in a way which may be called *implicit* : that is to say it is not recalled in detail itself but it invests the details which actually are presented at the moment with a certain relational significance, a sense of their meanings and bearings. This relational import is due to the preformed associations and to the place of the presented details in a context. Such implied revival enters in all recognition of a whole through some partial feature of it, and, in general, the pre-acquired knowledge which determines our present thought is only to a relatively small extent present to consciousness in distinguishable detail. To a far larger extent is it operative implicitly. We are thus conscious of the significance which determines the recognition, but as we cannot call to mind the details which constitute this significance neither can we describe them, or in other words, we cannot assign an explicit reason. For it is sometimes impossible to describe the resultant effect of previous experiences which are not at the moment present to the mind in detail, yet these experiences constitute the wider group of which the object given in detailed experience is apprehended as a fragment.(b)

7. We have spoken above of mediate and immediate recognition, and we shall now discuss further the relation of memory to inference. With reference to this we should like to quote the following passage :—“A witness may give the substance of conversations or writings, but he will not be permitted to say what

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ference.

(a) Sully, *Illusions*, pp. 262-3.

(b) Stout, *Groundwork of Psychology*, pp. 67-8.

is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences.”(a) Those authors apparently hold that recollection does not involve inference, an opinion which we believe to be erroneous as will appear in the course of this discussion.

Professor Sully, speaking of immediate knowledge, says “and it will be found that even with respect to memory, when the remembered event is at all remote the process of cognition approximates to a mediate operation, *viz.*, one of inference.”(b)

Binet after stating that there is no well-defined distinction between a perception-recollection and a perception-reasoning, quotes Professor Sully (Illusions, p. 235) ‘in both cases there is a reinstatement of the past, a reproduction of earlier experience, a process of adding to a present impression, a product of imagination taking this word in its widest sense. In both cases the same laws of reproduction or association are illustrated ; that is to say an association of resemblance followed by an association of contiguity . . . and our state of mind in recognizing an object or person is commonly an alternative between these two acts of separating the mnemonic image from the percept and so recalling or recollecting the past, and fusing the image and the percept in what is specially marked off as recognition.’ He then proceeds : ‘In what respect does a recollection differ from a reasoning ? This is difficult to determine. We grasp the analogies between these two acts much more easily than their differences. All that the most attentive observation teaches us is that sometimes the suggested image is projected and localized in the panorama of the past, of which it appears to be a fragment, and sometimes it is referred to a present object, and throws off the character of oldness, so as to appear actual.’(c)

When, therefore, we say a witness is guessing and does not really recollect, can we truly distinguish ? Are not both processes

(a) Ameer Ali and Woodroffe's 2nd
Edn. of the Indian Evidence Act,
p. 948.

(b) Sully, *op. cit.*, p. 16.

(c) Binet, Psychology of Reasoning,
p. 176

alike, in following out association of ideas ? Binet indeed traces the origin of memory to reasoning on the following grounds : "Memory as a vision into the past offers less utility than reasoning ; we have more frequent need to look before than behind : it is a kind of intellectual refinement to contemplate the things of the past as past, and without making them serve in the explanation of present facts. Therefore, it seems to us probable that memory is not a primitive but a superadded fact ; it has sprung from reasoning at a time when the struggle for existence became less imperious." (a)

Similarly, Mr. Bradley holds that recollection implies inference, for he says : "Memory is plainly a construction from the ground of the present. It is throughout inferential, and is certainly fallible", (b) and again speaking of the double aspect of memory, "We remember, on the one hand, because of prior events in our existence. But, on the other hand, memory is most obviously a construction from the present, and it depends absolutely upon that which at the moment we are." (c)

It would seem then that it is impossible to distinguish recollection from inference in the way desired and anyone who will swear that the impression left on him by a conversation was a recollection and not an inference, will in our opinion swear to a great deal. But this is not our only objection to the passage in question ; there appears to lie at the root of it a fallacious idea that impressions are not to be accepted as evidence because less trustworthy than statements of recollection of facts. Yet we never do under any circumstance reproduce all that has happened and we intentionally forget much that we see and hear, for it is only by omitting some details that we can recall what we want. What memory gives us is always an impression, or, as Professor Stout calls it, a generic image ; "We simply make an outline sketch, in which the salient characters of things and events and actions

(a) Binet, *Psychology of Reasoning*. p. 257.

p. 178.

(c) *Ibid.*, p. 356.

(b) Bradley, *Appearance and Reality*,

appear, without their individualising details. Mere forgetfulness in part helps to make this possible : but the generic image is an immense assistance. If I picture myself as eating my breakfast at the beginning of the day, it is enough to have a generic image of the breakfast-table and of myself sitting at it and possibly of the food presented to me. I pass over the details connected with the arrangement of the breakfast-table and the succession of particular incidents which took up the half hour spent in eating. Hence, it is possible for me to recall the whole event of taking breakfast, which occupied half an hour, in the fraction of a minute, and then pass on to something else.”(a)

It is thus idle in the sphere of memory to seek for anything better than impressions, and if we are to discredit these we must discredit all.

8. There are various ways in which the memory can be assisted. When an actual impression cannot be repeated, its reproduction will to some extent have the same result : thus we can keep the images of remote experiences from disappearing by periodically reviving them, as when children talk with their parents about common experiences of the past.(b) “Through the cumulate effect of mutual reminder, incident after incident returns, adding something to the whole picture till it acquires a degree of completeness, coherence and vividness that render it hardly distinguishable from a very recent experience. The process is like looking at a distant object through a field-glass. Mistiness disappears, fresh details come into view, till we seem to ourselves to be almost within reach of the object.”(c)

Now looked at as a revival of memory it may be a valuable thing for witnesses to talk over their experiences with one another before giving evidence : but this aspect of it is entirely left out of account in the view which is usually taken of it. Its sole

(a) Stout, *Analytical Psychology*, p. 177.
Vol. II, pp. 184-5.

(c) Sully, *Illusions*, pp. 259-60.

(b) Sully, *Outlines of Psychology*,

object is always taken to be to concoct together a story which each will tell consistently, and if a witness admits in the box that he has talked over the matter with another witness before entering the court he is as often as not considered unreliable merely on that account. We do not wish to maintain that no evidence is concocted or that it is never concocted in this manner, but we do protest against such a view being invariably taken, and we suggest as an alternative that talking over the occurrences beforehand may sometimes by reviving the memory render the evidence given not less but more reliable.

It is noted, however, (a) that, though by comparing recollection we may reach a rough average recollection which will be free from any individual error, there is a danger attached to it. There may be a cause of illusion acting on all our minds alike, as *e.g.*, the extraordinary nature of the occurrence which would pretty certainly lead to a common exaggeration of its magnitude, and this process of comparing recollections affords an opportunity of reading back a present pre-conception into the past.

It has no doubt been frequently noticed that it is easier to recall events in the order in which they occurred, and that witnesses, if left to themselves, habitually narrate occurrences in chronological order: it has always struck the writer that the method usually adopted by Public Prosecutors of asking questions, though it may be useful in excluding irrelevant matter, is certainly calculated to hinder memory. What may appear to be irrelevant according to the Evidence Act may in fact be a necessary link in the association of ideas of the witness, and if closely examined will often be admissible under s. 6 or one of the following sections of the Act. Dr. J. Ward has explained the order of recall as follows: "In a series of associated presentations A, B, C, D, E, such as the movements made in writing, the words of a poem learned by heart, or the simple letters of the alphabet themselves, we find that each member recalls its successor but not its predecessor B recalls C, why does

(a) Sully, *Illusions*, p. 292.

not C recall B? We have seen that any reproduction at all of A or B or C depends primarily upon its having been the object of special attention so as to occupy at least momentarily the focus of consciousness. Now we can in the first instance only surmise that the order in which they are reproduced is determined by the order in which they were thus attended to when first presented." "This connexion of association with continuous movements of attention make it easier to understand the difficulty above referred to, *viz.*, that in a series A, B C, D, B revives C but not A, and so on, a difficulty that the analogy of adhesiveness or links leaves unaccountable.(a) He further explains that these movements of attention come in the end to depend mainly on interest, but at first appear to be determined entirely by mere intensity.

Similarly Professor Sully says that in recall we renew the original order of the successive adjustments of attention, and he further notes that the action of attention on the order of revival is further illustrated in the selection under the lead of interest of a particular group from among a multitude of impressions, as when we successively fix the eye on certain interesting details of a landscape, the river in the foreground, the mountains in the background, &c., and afterwards recall these in the original order.(b)

It is highly important to allow a witness time when giving his evidence, not merely because hurry causes him to say what he may not really intend, but because of the actual process by which we recall a forgotten thing, which Professor James describes thus: we recollect the general subject to which the thought relates: the thing is a gap in the midst of other things. We then think over the details and from each detail there radiate lines of association forming so many tentative guesses. Many at once are seen to be irrelevant. These added associations

(a) J. Ward, Art. Psychology, Encyclopædia Britannica, 9th Edn., Vol. XX, p. 61.

(b) Sully, Outlines of Psychology, p. 182.

arise independently of the will by a spontaneous process, and our will lingers over those which seem pertinent and ignores the rest. Then the accumulation of associates becomes so great that the combined tensions of their neural processes break through the bar, and the nervous wave pours into the tract which has so long been awaiting its advent.(a)

Memoranda for the purpose of refreshing memory are of course admissible both in the English and Indian law under certain circumstances(b) which is no doubt due to the power of words to call up mental images : this being so, the decisions in English law prohibiting the witness from using a copy of a memorandum made by himself seem to be due to a confusion of ideas. In so far as the document is used for the purpose of refreshing memory, there seems no reason to suppose that a copy would not be efficacious in reviving the recollection, and as it is not the accuracy of the document to which the witness swears but to the revived recollections, it is surely immaterial whether the original or a copy is used, if either serves this purpose. Although the Indian Evidence Act allows the use of a copy, it is only provided that there is sufficient reason for the non-production of the original, which we must pronounce a vexatious and needless restriction : even if it could be shewn that the original was more adapted than the copy to revive memory, and we have never seen this point even discussed in any commentary on Evidence, that would be no reason for rejecting the copy in the absence of any thing better, at least if the object of the law really is to discover the truth and not blindly follow sets of technical rules framed by persons ignorant of psychology. Now, that it is not the actual handwriting of the document that recalls the events is the accepted opinion of the law, whether right or wrong, inasmuch as it is said that if the witness has become blind, the paper may be read over to him for the purpose of exciting his recollection,(c) and it has been held in

(a) James, *op. cit.*, Vol. I, pp. 585-86.

Evidence Act, s. 159.

(b) Best on Evidence, p. 208 ; Indian

(c) Taylor on Evidence, § 1410.

America that where a paper is signed with the mark of a witness who cannot read or write, it may be read over to him for the same purpose.^(a) Again, experts may refresh their memory by reference to professional treatises, which are printed matter, and there are rulings to the effect that in order to be useful for the purpose of refreshment a document need not be admissible itself as independent evidence.^(b) We can, therefore, only attribute this restriction to a confusion between reviving recollection and swearing to the accuracy of a recorded past transaction, &c., on the strength of a past recollection which is not revived, two entirely different matters, which are, moreover, separately provided for in s. 159 and s. 160 of the Indian Evidence Act.

9. Feeling as interest clearly influences and determines what

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Feeling.

we attend to and hence what we remember, and we shall have more to say on this point under the head of Prejudice. It is

with the revivability of the emotions that we are here concerned. It is easier, says Höffding, to recall ideas than the feelings which accompanied them. We can recall images and situations from the past but only most imperfectly the moods which animated us. We more easily recall the alternations and successions of feelings than the feelings themselves. Feelings are remembered by means of the ideas with which they were originally linked and in conjunction with which they composed a certain conscious state. This is a simple consequence of the slower movement of feeling: the thought returns in an instant. A hindrance will always be given in the feelings which prevail at the moment, and this will at all events modify the earlier feeling.^(c)

Still we can produce new griefs and raptures by summoning up a lively thought of their exciting cause, and though the cause is now only an idea it produces the same organic irradiations, or

(a) *Commonwealth v. Fox*, 7 Gray (Mass) 585 (Amer.) quoted on p. 1002 of Ameer Ali and Woodroffe, Indian Evidence Act, 2nd Edn.

(b) *Ibid.*, p. 1003, note 7.

(c) Höffding, *Outlines of Psychology*, pp. 241-2.

almost the same, which were produced by its original, so that the emotion is again a reality.(a) This explains why the narrative of a genuine witness is lively compared with that of a false one, who is unable to summon up even the reflection of an emotion of which he never experienced the exciting cause: for it is exceedingly difficult to imitate emotions because of the immense number of parts modified in each emotion. "We may catch the trick," says Professor James, "with the voluntary muscles, but fail with the skin, glands, heart and other viscera. Just as an artificially imitated sneeze lacks something of the reality, so the attempt to imitate an emotion in the absence of its normal instigating cause is apt to be rather 'hollow.' "(b) Feeling also affects our memories in another way: we project our present modes of experience into the past, and paint our past in the hues of the present. Thus we imagine that things which impressed us formerly must answer to what is impressive in our present stage of mental development: we unconsciously transform the past occurrence by reasoning from our present standard of what is impressive.(c) This is well expressed by Mr. Bradley: "Memory depends on reproduction from a basis that is present,—a basis that may be said to consist in self-feeling. Hence, so far as this basis remains the same through life, it may, to speak in general, recall anything once associated with it. And, as this basis changes, we can understand how its connections with past events will vary indefinitely both in fulness and strength. Hence, for the same reason, when self-feeling has been altered beyond a limit not in general to be defined, the base required for the reproduction of our past is removed. And, as these different bases alternate, our past life will come to us differently, not as one self, but as diverse selves alternately. And, of course, these "reproduced" selves may, to a very considerable extent, have never existed in the past."(d)

(a) James, *op. cit.*, Vol. II, p. 474.

(b) *Ibid.*, p. 450.

(c) Sully, *Illusions*, p. 268.

(d) Bradley, *Appearance and Reality*, p. 84.

If we reflect on this it would appear to afford an explanation of why a person sometimes gives contradictory accounts of the same thing, at all events when some interval elapses between his two statements. This change of memory, as it may be termed rather than obliviscence, might constitute a valid defence to a charge of perjury based on two contradictory depositions : it would certainly be one if the statements related to intentions or opinions or motives of the deponent, for we do not think much about these and do not become aware that they have changed. It would be less so in the case of statements of facts because the mind stereotypes these more and we have the greater distinctness of sensuous apprehension ; but we can easily conceive of circumstances in which it might be a true defence even here for the cases known to pathologists of double and alternate personalities are after all but exaggerated instances of the same kind of change, and in such persons the past is viewed entirely differently by each personality.

10. "When I distinctly recall an event," says Professor Sully,

"I am immediately sure of three things :

*Illusions of memory
and their causes.*

(a) that something did really happen to me ; (b) that it happened in the way I now think ; (c) that it happened when it appears to have happened." Hence, there are three classes of illusion :—(1) false recollections to which there correspond no real events of personal history ; (2) others which misrepresent the manner of the happening of the events ; (3) others which falsify the date of events remembered.(a)

The first kind is in the nature of hallucinations and concern imagination, the effect of which on memory has been thus described by the same writer. "Not only does our idea of the past become inexact by the mere decay and disappearance of essential features, it becomes positively incorrect through the gradual incorporation of elements that do not properly belong to it. Sometimes it is easy to see how these extraneous ideas

(a) Sully, *Illusions*, p. 242.

get imported into our mental representation of a past event. Suppose, *e.g.*, that a man has lost a valuable scarf-pin. His wife suggests that a particular servant, whose reputation does not stand too high, has stolen it. When he afterwards recalls the loss, the chances are that he will confuse the fact with the conjecture attached to it, and say that he remembers that this particular servant did steal the pin. Thus the past activity of imagination serves to corrupt and partially falsify recollections that have a genuine basis of fact. It is evident that this class of mnemonic illusions approximates in character to illusions of perception. When the imagination supplies the interpretation at the very time the mind reads this into the perceived object, the error is one of perception. When the addition is made afterwards, on reflecting upon the perception, the error is one of memory.” (a)

But beside confusing facts with conjectures we may also confuse experiences themselves, and this is a source of many errors. To quote the same writer “the record of memory is being continuously falsified by the effects of time, the loss of certain constituents of the experience, and the confusion of experiences one with another. And to this may be added that, in recalling past experiences, we tend without any clear intention to omit and even to re-arrange so as to suit new circumstances, or gratify a new interest. Thus in various ways, the reproductive process is adulterated by an admixture of sub-conscious production.” (b)

Such confusions may usually be traced to association of ideas especially in the case of a misrecollection of dates or the mistaking of persons. How this comes about may be seen from the following: “We might find, *e.g.*, that the two persons were associated in my mind by a link of resemblance, or that I had dealings with the other person about the same time. Similarly,

(a) Sully, *Illusions*, pp. 264—5.

(b) Sully, *Outlines of Psychology*, p. 223.

when we manage to join an event to a wrong place, we may find it is because we heard of the occurrence when staying at the particular locality, or in some other way had the image of the place closely associated in our minds with the event. But often we are wholly unable to explain the displacement.” (a)

Such fallacies depend on the adulteration of pure observation with inference and conjecture : there are others due to a rather different cause which has been termed, by Professor Stout, coalescence. Coalescence or overlapping is where an old combination or new combination is relatively so powerful as to overbear the tendency opposed to it without a struggle. It may take place between a new percept and the predisposition left by previous percepts and may also extend to the corresponding memory image, or it may take place between mental images. It produces falsification of memory and perception. Our memory of what has happened becomes modified in accordance with our desires, our view of what ought to have taken place ; this falsification becomes greater in proportion to the lapse of time, hence a narrative written down at once after the occurrence of a fact will be more exact than one written later. So also the gradual transformation of a story as it passes from one person to another is in part due to coalescence. Each hearer unconsciously modifies it according to his preconceived ideas and transmits it to his neighbours with this added modification.(b) It is of course largely to guard against this that hearsay evidence is prohibited in law. Professor James describes this as one great source of the fallibility of testimony meant to be quite honest : “ The most frequent source of false memory is the accounts we give to others of our experience. Such accounts we almost always make both more simple and more interesting than the truth. We quote what we should have said or done rather than what we really said or did ; and in the first telling we may

(a) Sully, *Illusions*. p. 266.

(b) Stout, *Analytical Psychology*. Vol. I, pp. 286—7

be fully aware of the distinction. But ere long the fiction expels the reality from memory and reigns in its stead alone.”(a)

Enough perhaps has been now said to make clear the chief sources of error in memory and what in consequence must be looked for in weighing evidence, and at the same time to assist in estimating the value of a defence such as error, lapse of memory, &c., put forward by an accused in a case of perjury.

NOTE.

We desire to mention a view of memory which rests perhaps on too metaphysical a conception to include in the body of our text. It depends on the theory of consciousness which has recently found favour with philosophers, such as Professors James, Mr. F. C. S. Schiller, &c., known as the transmission theory, according to which the human brain is merely a machine for regulating and restraining the consciousness which exists outside it. It does not produce consciousness, but limits it and confines its intensity within certain lines, contracts its manifestation within the sphere which it permits: it is a permanent obstruction to the transmission of consciousness. How this view will apply to memory can be gathered from the following quotation:—“And again if the body is a mechanism for inhibiting consciousness, for preventing the full powers of the Ego from being prematurely actualized, it will be necessary to invert also our ordinary ideas on the subject of memory, and to account for forgetfulness instead of for memory. It will be during life that we drink the bitter cup of Lethe, it will be with our brain that we are able to forget. And this will serve to explain not only the extraordinary memories of the drowning and the dying generally, but also the curious hints which experimental psychology occasionally affords us that *nothing is ever forgotten wholly and beyond recall.*”(b)

(a) James. *op. cit.*, Vol. I, pp 373-4.

of the Sphinx, 1891, pp. 293, *et seq.*

(b) See F. C. S. Schiller's Riddles

The significance for our present purpose lies in the last words : it is a warning against confidently rejecting as untrue statements which appear to involve an exercise of memory beyond the ordinary human powers.

CHAPTER V.

ATTENTION—THE SENSES—INTROSPECTION—INFERENCE.

Psychological description of Attention—Movements in Attention—Inhibition—Spontaneous and Voluntary Attention—Determinants of attention—Interest—Effects of Attention—The Scope of Attention and of Consciousness—Attention and Intention.

The Senses—sensible perceptions not necessarily the same in different individuals—to what extent they may be assumed identical, examples of exceptional powers of the senses in hypnotic, pathological and other states—conclusions to be drawn from these cases.

Introspection—Its difficulties and sources of error—Value of the Introspective method—Insight, how we apprehend others' feelings and thoughts.

Inference—Implicit or unconscious and conscious reasoning—Matter of fact and matter of opinion—false distinctions as to.

Note on the attitude of some persons towards unusual psychological phenomena.

AMONG the conditions on which depends the capacity of a

Psychological
Description of
Attention.

party to give a faithful account of things
Best alludes to attention in the following
terms :— “ Whether the circumstances he

narrates were likely to attract his attention, in consequence of their importance, either intrinsically or with relation to himself”.(a) This subject has been incidentally treated of in the chapter on memory, and the effects of attention on various mental states are so frequent that constant allusion to it occurs throughout this volume, we shall therefore devote as brief a space as possible to it here.

First, we shall attempt to describe psychologically in what attention consists and this cannot be done in a few words. Attention is not a separate faculty of the mind which acts on the other psychical phenomena. but is the name given to a certain state of

(a) Best on Evidence, § 22.

consciousness as a whole, and that state is one of monoidism. "The normal condition," says Ribot, "is plurality of states of consciousness or polyideism. Attention is the momentary inhibition to the exclusive benefit of a single state of this perpetual progression, it is a monoidism" (a) and again "Attention consists in the intellectual state, exclusive or predominant, with spontaneous or artificial adaptation of the individual." It is not, however, a complete monoidism; it supposes the existence of a master-idea drawing to itself all that relates to it, and nothing else, allowing associations to produce themselves only within very narrow limits, and on condition that they converge towards a common point.

Similarly Professor James describes it as "the taking possession of the mind, in clear and vivid form, of one out of what seem several simultaneously possible objects or trains of thought. Localization, concentration, of consciousness are its essence. It implies withdrawal from some things in order to deal effectively with others. . . . one principal object comes then into the focus of consciousness others are temporarily suppressed." (b)

If you try to analyse attention further you get the following factors given by Wundt. Attention contains three essential constituents; an increased clearness of ideas; muscle sensations which generally belong to the same modality as the ideas, and feelings which accompany and precede the ideational change. At the same time the concept of attention proper has no reference to the first of these processes, but only to the last two.

Apperception, therefore, denotes the objective change set up in ideational content, attention the subjective sensations and feelings which accompany this change or prepare the way for it. Both processes belong together as parts of a single psychical event. Attention in the wider sense is not—and this is the important point—a special activity, existing alongside of its three constituent

(a) Ribot, the Psychology of Attention, pp. 4, 6.

(b) W. James, Principles of Psychology, Vol. I, pp. 403-5.

factors, something not to be sensed or felt, but itself productive of sensation and feelings. No! in terms of our own psychological analysis at least, it is simply the name of the complex process which includes those three constituents. Their nature makes it plain enough why we regard attention as subjective activity, without our needing to assume any special consciousness of activity independent of the other mental elements."(*a*)

Great stress is laid by Ribot on the physical concomitants of attention. These consist in movements and
 Movements in at-
 tention, Inhibition. he insists that the movements of the face, body, limbs, and the respiratory modifications that accompany attention are not merely effects, outward marks, but necessary conditions, and that if you totally suppress movements you suppress attention. The fundamental rôle of the movement is to maintain the appropriate state of consciousness and to reinforce it, and it is these motor manifestations, together with the state of consciousness which constitute their subjective side, that actually make up attention.(*b*)

And since attention is said to maintain its state by inhibition it is well to describe here what is meant by this term. "The fundamental property of the nervous system consists in the transformation of a primitive excitation into a movement. This is reflex action, the type of nervous activity. But we also know that certain excitations may impede, slacken or suppress a movement(*c*) *e. g.*, suppression of the movements of the heart through irritation of the pneumogastric nerve. This power of inhibition exists also in the brain, just as we can begin, continue or increase a movement, we can also suppress, interrupt or diminish it; every act of volition, whether impulsive or inhibitory, acts only upon muscles and through muscles. The mechanism of attention is motor, and in all cases of attention there must necessarily be a play of muscular elements, real or nascent movements, upon which the power of inhibition acts.

(*a*) Wundt, *Human and Animal Psychology*, p. 249.

(*b*) Ribot, *op cit.*, pp. 19—23.

(*c*) *Ibid.*, pp. 40—47.

Spontaneous attention is natural and devoid of effort, and is produced by some anterior emotional state; voluntary attention is artificial, caused by the struggle for existence and under pressure of necessity and by education. By means of it an artificial interest is given to things for which men had naturally no liking; it is a product of civilization and adaptation to the conditions of a higher social life and an imitation of natural attention. It is with spontaneous attention that we shall be chiefly concerned in this chapter.

2. Best speaks of the importance of a circumstance either intrinsically or with relation to the observer as the cause of attention. What exactly is meant by the phrase intrinsic importance is not very clear, but we understand him to refer to events which are supposed to interest every one and events which interest the observer only or specially, but at all events it is interest in some form or shape to which he alludes. That we attend to what we are interested in is of course so universally admitted as to be almost a truism; we only notice such items, and without selective interest our experience would be a chaos.^(a) It follows from this that attention will vary with the number and nature of the interests which observers possess. "We dissociate" says Professor James "the elements of originally vague totals by attending to them or noticing them alternately of course. But what determines which elements we shall attend to first? There are two immediate and obvious answers; *first*, our practical or instinctive interests and *secondly*, our æsthetic interests....now a creature which has few instinctive impulses or interests, practical or æsthetic will dissociate few characters, and will at best have limited reasoning powers, whilst one whose interests are very varied will reason much better."^(b)

Now it is often laid down as the mark of a false witness that he declines to commit himself to details on which he might be

(a) James, *op. cit.*, Vol. I, p. 403.

(b) *Ibid.*, Vol. II, pp. 341—345.

contradicted, falling back on such excuses as that he did not notice, or he does not recollect, &c., and it is not always easy to decide whether such pleas are genuine or not. The details on which he is questioned are really matters which, assuming he were a genuine witness, he might or might not be expected to have noticed according to the interests which he naturally possesses, and it by no means follows that because one witness has observed certain details, others, if they were really present, could have done the same, *i.e.*, unless all men have the same interests. It is difficult for the judge and the advocate who are considering the matter after the event, when it has become a subject of special interest to them, to realise that before the existence of the case there was no such cause to excite the interest of the witness, and it is also difficult for them, equipped as they are with certain interests of their own, to place themselves mentally in the position of a man differently equipped, and estimate how much can reasonably be expected from him in the way of attention. It requires both knowledge of the people and natural powers of imagination. It must also be remembered that there are other causes of variations of attention in individuals; thus Obersteiner found that attention generally requires more time in ignorant individuals than in people of culture; in women than in men, which latter by their particular mode of life, have developed the power of inhibition; in old people than in adults and young people; which doubtless must depend on a less rapid function of activity.”(a)

Interest is ultimately based on emotion, and the emotional states have their primordial source in the organic vegetative activity. The states designated as needs, appetites, inclinations, tendencies and desires, are the direct and immediate results of every animal organisation and the true basis of emotional life. And so Ribot says “Attention depends on emotional states, these are reducible to tendencies, tendencies are fundamentally movements

Interest depends
on emotion.

(a) Ribot, *op. cit.*, p. 67.

or arrested movements, and may be conscious or unconscious. Attention both spontaneous and voluntary is accordingly, from its origin on, bound up in motor conditions.”(a)

It is then whatever crosses or satisfies these tendencies that interest us ; whatever produces in a man an agreeable, disagreeable or mixed state, and the intensity and duration of attention depends on the intensity and duration of the desires, satisfaction, discontent, jealousy, &c. The feelings of pleasure and pain are thus not the causes of attention but signs that shew that certain appetites, tendencies, &c., are satisfied or thwarted, and Prof. Stout denies that interest is the cause of attention, on the ground that it is merely attention considered in its hedonic aspect : they are really coincident, interest, as actually felt at any moment, being nothing but attention itself.(b)

Among the determinants of attention are the strength and persistence of an impression, its suddenness, novelty and generally its disturbing character in relation to the pre-existing state of mind. This is really again the volume and intensity of the feeling it excites, which may be bound up with the idea of past impressions and so revived along with them. But not only novelty but also familiarity is a cause of attention, the circle of established feelings and interests, and especially when we have the old presented in a new setting.(c) Surprise or astonishment is spontaneous attention excited by something new or unexpected, it is an emotion, and it is probable that in it we have imperfect knowledge because we have too much sensation.(d) As remarked, when speaking of memory, emotion up to a certain point is favourable to attention, but “whenever sensation passes beyond a certain pitch of impressiveness, and especially when it becomes so intense as to be markedly painful, it disturbs attention and, so to speak, clogs the wheels of thought. This holds good of

(a) Ribot, *op cit.*, p. 111.

(c) Sully, *Outlines of Psychology*,

(b) Stout, *Analytical Psychology*,
Vol. I, pp. 224—5.

pp. 87—92.

(d) Ribot, *op. cit.*, p. 25.

presentations which are otherwise capable of exciting and sustaining attention....in such instances sensuous intensity is hostile to attention, but normally it is of course a condition which favours attention to objects with which the impressive sensations or images are connected. This is so, because, within limits, the stronger the sensations are, the more effective are they in exciting co-ordinated groups of psychical dispositions.”(a)

Effects of attention.

3. The effects of attention may be regarded as two-fold; as expectant attention or pre-attention; it is a preparatory stage in the course of which the image of an event foreseen or presumed is evoked. The state of monoidism is formed, with the result that the real event is but the reinforcement of the representation already existing.(b) This organic adjustment and ideational preparation shortens re-action-time and accelerates perception.

In its other aspect, it is doubtful whether it actually augments the intensity of sensations, but it increases the clearness of all that we perceive or conceive, and this it does in several ways. It chooses the appropriate states and maintains them, by inhibition, within our consciousness, and so secures a certain persistence in the sensation or idea; it thus leads to its retention and so secures its reproduction, as described under the head of memory. (c) Again the concentration of attention upon some objects diminishes the intensity of presentation of others in the same field whether the concentration be voluntary or non-voluntary, for our power of attention is limited, and if, therefore, attention is drawn off by new presentations, it must be at the expense of old ones; if it is kept concentrated on old ones, new ones cannot gain an entrance into consciousness. It is this redistribution of attention which explains its influence on will.(d)

(a) Stout, *op. cit.*, Vol. I, p. 187.

(b) Ribot, *op. cit.*, p. 68.

(c) *Ibid.*, p 59; James, *op. cit.*, Vol. I, p. 426; Sully, *op cit.*, pp. 93-4.

(d) J. Ward, Art Psychology, Encyclopædia Britannica, 9th Edn., Vol. XX, pp. 42, *et seq.* Animal Magnetism, p. 319.

Further, though attention itself only increases the force of certain sensations in proportion as it attenuates others, in attending to a thing we almost always develop our idea of it, so that the thought of it becomes more and more discriminative and determinate. (a) If, therefore, it cannot be said that attention *per se* distinguishes, analyses, &c., which are processes of intellectual discrimination, we are through attention led to do so.

Considering the admitted importance of attention as constituting one of the main conditions which influence a witness's ability both to observe at the time of an occurrence and to subsequently reproduce an accurate account of it, it is disappointing to find so few allusions to it in the writings on legal evidence.

It is not uncommon to hear it given as a reason for discrediting a statement, that the witness could not possibly have seen or heard all that he professed to have been aware of, his attention being taken up at the time by this or that event, and it is a frequent saying that one cannot attend to two things at the same time. It is therefore proposed to say something as to the powers of attention which the ordinary individual possesses.

To understand this we must distinguish between consciousness and attention. There are various grades of consciousness down to actual unconsciousness, but we only call it attention when the psychical content is clearly grasped and the mental state is accompanied by a special feeling; other psychical contents are merely apprehended, they are included in the field of consciousness but attention is not concentrated upon them. These latter contents come and go within the field of consciousness but do not advance to the fixation point at which we have attention. (b) Now, the difference between the scope of attention and the scope of consciousness has been measured in the following way:—"In any temporal idea those components only

(a) Stout, Vol. I, p. 127 *op. cit.*

(b) Wundt, *Outlines of Psychology*, p. 229.

which belong to the present moment are in the fixation point of consciousness, and by the use of special instruments it has been found that taking, *e.g.*, rhythmical auditory impressions, hammer strokes, &c., the amount of content which can enter into the scope of attention at a given moment is 6 to 12 simple impressions, while 16 to 40 such impressions can enter into the scope of consciousness.

Speaking roughly, therefore, a man can be aware of three or four times as much as he can actually attend to, and it is untrue that he can only attend to one impression or one idea at a time. (a)

There is also another subject on which the study of attention appears to us to throw some light; we allude to the distinction between implicit knowledge and knowledge which is actually present and used by the agent at the time of the act, which was drawn by us when speaking of the 'knowledge equals intention' presumption of law. (b)

We doubt if any one would accept the proposition that a person can intend to do something to which he does not attend at all, and yet the knowledge which is attributed to him (and therefore the resulting intention) according to the presumption in question, does not necessarily imply attention to what he is supposed to know or intend. "Active intention," says Mr. Bradley, "we may say roughly, is the dwelling ideally on an object so as to do something practical or theoretical to that object or with regard to it" (c) and he regards as the two essential features of attention: *first*, the domination of the idea, and *secondly*, its maintenance before the mind by my activity. Active attention is fixed always by an idea of an end, and this idea is maintained in consciousness, and developed through attention, hence it is that attention implies more than mere knowledge. It is not itself volition but it implies volition, inasmuch as I must do something to support and maintain the ideal object before me. In a case, *e.g.*, where, without pausing to think about my suggested action, I act at once, he

(a) *Ibid.*, pp. 230—3, 236.

(b) See p. 48.

(c) Bradley on Active Attention,
Mind N. S. No. 41, p. 9.

denies that there is attention ;(a) “we are to suppose that there is present here an idea of what I am about to do, for without such an idea we should certainly not have volition. But in the case supposed the idea realizes itself forthwith without any further ideal development, and in such a case we have in the proper sense no attention. I certainly perceive an object, and that object may, as we say, violently strike me, and I may also be dominated and overpowered by the idea of my action on the object, but with all this, if I go on to act at once, I do not actively attend. My attention will under certain conditions, it is true, follow as a consequence, but it has so far had no time in which to develop itself, and so far in fact it is not there.”

Still less of course would there be attention in the impulsive instinctive type of act in which there is no clear idea at all in the mind, but at the most a general idea of striking, &c., such as we have elsewhere spoken of. It seems to us that when it is realised in what attention actually does consist, and the kind of mental state which it necessarily involves, it becomes apparent that, unless you are prepared to hold that you can have intention without attending to the object of the intention—a proposition little short of a contradiction in terms—it must be admitted that the mental state which is attributed to the agent by means of the legal presumption employed may easily have nothing in common with real intention beyond the fact that they are wrongly described by the same name.

4. A second condition on which depends the capacity of a party to give a faithful account of things is, according to Best “his powers, either natural or acquired, of perception and observation.” (b) This species of evidence is commonly called ‘immediate’ where the thing comes under the cognisance of our senses, and is usually considered the most satisfactory and convincing.(c) It is also

(a) Bradley on Active Attention,
Mind N. S. No. 41, p 14.

(b) Best on Evidence, § 22.
(c) *Ibid.*, §§ 28 197

sometimes termed 'original' or 'direct'. It is proposed, therefore, to say something here on the subject of sensation and our senses.

It is not intended to deny that in sense-perception we probably do get nearest to outward reality, and that we have most certainty in this form of intuitive knowledge, but, as Mr. Bradley says, it is impossible to always use actual present sensation as a test of truth, and it is both a strange prejudice that outward sensations are never false, and dull blindness to fail to recognise that the 'inward' is a fact just as solid as the 'outward'.(a)

Some sources of error in sense-perception are given elsewhere under the head of Illusions and to these no reference will here be made; we rather wish to insist on the point that though each individual may be sure of his own sense-perceptions, he cannot, or should not, be equally sure that others necessarily perceive as he does. Yet the attitude of the ordinary man is to accept the statements of others as to their sense-perceptions only so far as what they say agrees with his own experience; it is a natural attitude, it is true, but we think it would be well to recollect the assumption on which it is founded and to be sometimes less sceptical as to the possibility of what others say they have experienced.

"I don't think," says the writer quoted above, "we can be sure that the sensible qualities we perceive are for everyone the same. We infer from the apparent identity of our structure that this is so; and our conclusion, though not proved, possesses high probability....what, however, we are convinced of, is briefly this, that we understand and, again, are ourselves understood.....the fact is that, in the main, we behave as if our internal worlds were the same. But this fact means that, for each one, the inner systems coincide.....what is the amount of variety then which such coinciding orders will admit? We must, I presume, answer that, for all we know, the details may be different but that the principles cannot vary. There seems to be a point beyond which, if laws and

(a) F. H. Bradley, *Appearance and Reality*, p. 189.

systems come to the same thing, they must be actually the same. And the higher we mount from facts of sense, and the wider our principles have become, the more nearly we have approached to this point of identity.....It is, for example, more likely that we share our general morality with another man than that we both have the same tastes or odours in common.”(a)

This is an instructive passage, though we doubt whether most readers would look for identity in our ideas rather than in our sensations ; we shall, however, give reasons for believing that mankind are less alike than is usually supposed, both in their powers of sensation and ideation.

5. In order to show that some individuals possess powers beyond the average, the examples cited must necessarily be of an abnormal kind, or at least of a kind which are at present considered abnormal, and it is, therefore, submitted that to discard these from consideration as exceptional instances, would be merely to admit that our contention is established but to refuse to face the consequences. The consequences, as we hold, are simply the conclusion that under similar circumstances it is probable that any man might exhibit the same powers, and, stated more broadly, that as our knowledge is at present insufficient to lay down under what conditions such powers can be exerted, it is unsafe to reject as incredible reported cases of the exercise of such powers.

“ In somnambulism (the meaning of which is explained in the remarks on Hypnotism) the senses are not merely awake but quickened to an extraordinary degree. Subjects feel the cold produced by breathing from the mouth at a distance of several yards..... The activity of the sense of sight is sometimes so great that the range of sight may be doubled, as well as the sharpness of vision. The sense of smell may be developed so that the subject is able to discover by its aid the fragments of a visiting card which had been given him to smell before it was torn up (Tagnet).

(a) F. H. Bradley, *Appearance and Reality*, pp. 344-5.

The hearing is so acute that a conversation carried on in the floor below may be overheard (Azam).”(a) Surely this shows that we actually possess greater powers than we usually display, and when persons are reported to have displayed them on any occasion we should at once enquire as to the condition of the subject at the time, whether he was undergoing great excitement, etc.

Again as to memory the same writers say that its power is exaggerated under somnambulism and depressed on a return to the normal state, and we are completely ignorant of the cause of such variation; (b) but for more concerning this we must refer the reader to our remarks elsewhere on exceptional memory in certain pathological states.

As to touch, it is said “the hyperæsthesia of the sense of touch enables the subject to recognize the contact of one operator in a thousand; he may even recognize it through his clothes.” (c) Prof. James has also quoted a number of instances of hyperæsthesia of the senses (d) in one of which a person was able to pick out a blank card from a pack of similar ones merely by its weight, in another a man was actually able to read the image of a page of a book reflected on the operator’s cornea and to discriminate with the naked eye details in a microscopic preparation. Such powers explain the so-called ‘Magnetic rapport’ with the operator when the patient’s senses are acutely sharpened for all the operator’s movements. “I must repeat, however,” says Prof. James, “that we are here on the verge of possibly unknown forces and modes of communication. Hypnotization at a distance, with no grounds for expectation on the subject’s part that it was to be tried, seems pretty well established in certain very rare cases. See in general, for information on these matters, the Proceedings of the Soc. for Psych. Research, *passim*.”

(a) Animal Magnetism, Binet & Féré, pp. 134-5.

(b) *Ibid.*, p. 142.

(c) *Ibid.*, p. 151.

(d) James, *op. cit.*, Vol. II, pp. 609-611. See also his Essay on Psychical Research in the Will to Believe and other Essays, pp. 299, *et seq.*

And lest the reader should think that such examples are confined to cases of hypnotism we would here allude also to instances in which persons just prior to death have displayed extraordinary powers of vision and hearing, being aware of the approach of a friend some time before he would ordinarily be within either hearing or seeing distance, and sometimes appearing to see through walls and opaque surfaces. It is the great service of the late Mr. Myers and the Psychical Research Society that they have accumulated and investigated so many cases of this description that the unprejudiced reader can no longer refuse to admit their occurrence, whatever their explanation may be.

Lastly reference must be made to unusual powers which blind people sometimes appear to possess. Thus Mr. W. H. Levy stated that he seemed to perceive objects through the skin of his face and to have the impressions immediately transmitted to the brain. None of the five senses had anything to do with this power and he regarded it as an unrecognized sense which he called 'facial perception'. By it he could distinguish shops from private houses, point out doors and windows whether they were shut or open, estimate the height of a fence and discover irregularities in height, and projections and indentations in walls.^(a) Helen Keller who lost her sight and hearing in early infancy, can recognize persons by the mere contact of their hands.^(b) And as regards ideas an instance showing the different powers of individuals will be drawn from general ideas. It was long disputed as to how these were formed and what was the character of the generic image employed, but it now seems clear that different individuals employ different images, and they could not for a long time conceive it possible that anyone could employ in thought any other kind of image than those they themselves used. The truth was discovered here mainly by examination of unusual and exaggerated instances. "The study of a large number of normal and morbid

(a) See the Extracts from his work 'Blindness and the Blind' quoted by James, *op. cit.*, Vol. II, pp. 204-205.

(b) Stout, *Groundwork of Psychology*, pp. 58-59.

cases," says Ribot, "has led to the knowledge of several types : motor, auditory, and visual according to the group of images predominating in each individual, not to mention the ordinary or indifferent type. The person who thinks his words by articulating them without hearing them (Stricker) and the person who thinks his words by hearing them without articulation (V. Egger) ; the person who thinks his words by seeing them written, without either hearing or articulating them, all these represent irreducible types. This precludes all discussions, each person is right in so far as he himself, and people like him are concerned ; but he will be wrong if he generalizes without restriction." (a)

There further appear to be means of communicating ideas which as yet are not understood. Speaking of M. Richet's Essay on Mental Suggestion, Binet says : "His researches tend to the conclusion, which the author regards as probable, that thought is transmitted from one brain to another without the intervention of signs appreciable to our senses," (b) a subject which has been investigated by the Psychical Research Society under the title of Thought Transference.

Finally we must briefly allude to the phenomenon known as double consciousness ; experiments concerning it seem to prove that when a sensation is given, if its intensity is diminished it is no longer perceived by the principal consciousness, but may be discovered in a secondary consciousness, which can perceive or experience sensations below the intensity required for the ordinary consciousness. Hence in hysterical persons there seems reason to believe that sometimes they may actually experience by their second consciousness or sub-consciousness what others cannot. (c)

6. It is not proposed to offer conjectural explanations of the above facts, but to accept their existence and to state the conclusion which the author would draw from them.

Conclusions to be
drawn from these
cases.

(a) Ribot on Attention, p. 51, note.

(b) Binet, Double Consciousness, p. 6.

(c) Binet, Double Consciousness
p. 65 and *passim*.

It is said by Best, referring to the observer's powers of perception and observation "and here it is important to ascertain whether he is a discreet, sober-minded person, or is imaginative and imbued with a love of the marvellous, and also whether he lies under any bias likely to distort his judgment."(*a*) The caution no doubt is needed, but we must at the same time observe that there is too great a tendency to set down as 'Imaginative and imbued with a love of the marvellous, anyone who professes to have seen or heard anything unusual, and to discredit him merely on such a ground. We do not doubt that the criticism that will be passed on some, at all events, of the instances we have cited is that they are examples of powers said to have been displayed by people in pathological and unduly excited states and are therefore not to be trusted. But it is not against these cases that they are of this description, for it would appear that it is especially when persons are in such states that they display them, and if therefore such states are a condition of their display it is equivalent to begging the question to discredit them on that very ground.

We think that it has been sufficiently shown that under certain circumstances unusual powers of sensation are displayed, and that we have no grounds for limiting the possibility of their display to those particular circumstances: when therefore it is asserted on oath by an apparently respectable witness that he saw or heard or otherwise experienced something involving a display of power of the sense concerned beyond what the Magistrate believes to be possible to himself or mankind in general, his statement should not be forthwith discredited as impossible. "When a supposed fact," says Best, "is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible."(*b*) But the laws of nature are not fixed and immutable and such an assumption is absurd. "Whatever the *forces* of nature may be," says Dr. Ward, "the *laws*

(*a*) Best on Evidence, § 22.

(*b*) *Ibid.*, § 24.

of nature are not facts, as the constant confusion of the two conceptions might lead us to suppose. Every such law was at its inception merely a hypothesis awaiting verification.”(a) They are simply what our knowledge makes them, and vary with it, and what may have formerly appeared to us physically impossible is no longer so, we submit, in the light of our present information concerning the senses and their powers. To fail to maintain an open mind on such a matter and to give to a statement of the kind we have described a careful consideration may easily result in a wrong decision on the evidence, the usual termination of wholesale scepticism.(b)

7. It is said : “a person may always testify to his own mental and physical condition, his testimony being based not on inference but consciousness, but it is not so with respect to the mental condition of others.”(c) ‘Consciousness’ however is too wide a term as it stands for the whole mental state for the time being, which may well include inference : as opposed to inference, intuitive knowledge or perception is doubtless intended, and, as it is of the individual’s own mental condition, introspection may be the word appropriately employed.

Now it is only the Psychologist who is truly aware of the difficulties of introspection : the plain man has usually little doubt that he can describe his feelings correctly and the law really permits his description of them because it shares this belief, though writers on evidence may seek to account for it by distinctions between inference and consciousness. It is proposed therefore to explain what the difficulties are in order that it may be realized to what extent a witness is likely to err when he tries to depict his mental condition.

(a) J. Ward, *Naturalism and Agnosticism*, Vol. II, pp. 219-220.

(b) On the attitude of the average man towards unusual Psychical Phenomena, see note at the end of

this Chapter.

(c) Ameer Ali and Woodroffe’s 2nd Edn. of the Indian Evidence Act, p. 380.

"When the Psychologist," says Ribot, "attempts by internal

Sources of error in
introspection.

observation to catch himself, as he calls it, he attempts an impossibility. At the instant he sets about this task, either he will

adhere to the present, which will hardly advance him; or extending his reflection over the past, he will affirm himself to be the same as he was one year or ten years ago.....By inward

✓ observation he can only apprehend passing phenomena.....In fine to reflect upon the ego is to assume an artificial attitude which changes the nature of the ego; it is to substitute an abstract representation for a reality. The true ego is that which feels, thinks, acts without exposing itself to its own view; for by nature and by definition it is a subject; and to become an object it must undergo a reduction, a kind of adaptation to the optics of the mind which transform and mutilate it."(a) Somewhat similarly Mr. Bradley says, "we may confuse the feeling which we study with the feeling which we are. Attempting so far as we can to make an object of some (past) psychical whole, we may unawares seek there, every feature which we now are and feel, and we may attribute our ill-success to the positive obstinacy of the resisting objectto observe a feeling is to some extent always to alter it;" and again there is the difficulty of description. "Feeling cannot be described for it cannot, without transformation, be translated into thought," though you may find reality in feeling you do not get it in description of feeling; "we find this exemplified most easily in an ordinary emotional whole.....if made an object, it as such, disappears. The emotion we attend to is, taken strictly, never precisely the same thing as the emotion which we feel. For it not only, to some extent, has been transformed by internal distraction, but it has also now itself become a factor in a new-felt totality."(b)

Prof. Sully terms an illusion of introspection an error involved in the apprehension of the contents of the mind at any

(a) Ribot, *Diseases of the Personality*, pp. 83, 85.

(b) Bradley, *Appearance and Reality*, pp. 232, 521.

moment, such as mistaking the quality or degree of a feeling or the structure of a complex mass of feeling, or confusing what is actually present to the mind with some inference based on this. (a) He explains that what we are accustomed to call a purely presentative cognition, is really partly representative and there is no such thing as pure feeling ; the recognition of internal feelings implies the presence of the appropriate or corresponding class-representation, and if a wrong representation gets substituted for the right one, the feeling is wrongly classified. As external sensations come in groups and our consciousness is made up of a mass of feelings and active impulses which combine in an inextricable way, and as further mental states are not abiding and steady but unstable, fleeting, and changeable, analysis is difficult. (b)

Again, there is the sub-conscious region, for conscious personality does not include all that takes place in the nervous centre, but is only an abstract or synopsis of it ; (c) here the feelings, if feelings they may be called, are shadowy, but influence the total state though we do not perceive it, and in rare cases we have two states of consciousness not known to each other, co-existing in the mind of the patient, two rational faculties mutually ignorant ; such splitting up of the mind into separate consciousness is probably only possible where there is abnormal weakness ; but, Prof. James, after reviewing the evidence, says, "they prove one thing conclusively, namely, that we must never take a person's testimony, however sincere, that he has felt nothing, as proof positive that no feeling has been there. It may have been there as part of the consciousness of a 'secondary personage' of whose experience the primary one whom we are consulting can naturally give no account." (d) Another cause of error is the change of our moods ; the law of relativity causes us to regard certain states as indifferent when we glance back at them in moments of strong

(a) Sully, *Illusions*, p. 192.

(b) *Ibid.*, p. 193.

(c) Ribot, *op. cit.*, p. 150.

(d) Binet, *Double Consciousness*, p. 43 ; James, *op. cit.*, Vol. I, p. 209.

excitement, for 'we can recall images and situations from the past but only most imperfectly the moods which animated us.'(a)

Considerable power of abstract attention is in the first instance required to recognize an internal state, and if it is a passion, this state is not favourable for observation; and, apart from the other sources of error mentioned above, there is further the fallibility of memory. Nor is the mere certainty of the witness a guarantee that can always be trusted because, as Prof. Sully says, "transitory feelings which cannot at the moment be seized by an act of attention are pretty certain to disappear at once, leaving not even a temporary trace in consciousness."(b) Hence we easily deceive ourselves. For example, a motive may enter into our action which is so entangled with other feelings as to escape our notice, and "if a man is asked whether a rapid action was a voluntary one, he may in retrospect easily imagine that it was not so, when as a matter of fact the action was preceded by a momentary volition. When a person exclaims 'I did a thing inadvertently or mechanically' it often means that he did not note the motive underlying the action."(c)

Finally, present feeling or thought can be confounded with some inference based on it, and in the case of present emotional states the present is liable to be confused with the past: concerning inference more will be said later.

The chief causes of these illusions of consciousness are then the confusion of distinct elements, including wrong suggestion, due to the intricacies of the phenomena, a powerful disposition to read something into the phenomena, and the mixing up the facts of present consciousness with inferences from them.

8. It must not be supposed, however, that we wish to deny any validity to introspection. Here, if anywhere, we have immediate knowledge, and it is this which gives us the feeling of certainty which is sometimes apt to mislead us; it is rather as a protest

Value of the Introspective method.

(a) Höffding, *Outlines of Psychology*, pp. 241, 287.

(b) Sully, *op. cit.*, p. 199.

(c) *Ibid.*, p. 204.

against excessive reliance on such evidence that we have thought it right to enumerate the sources of error connected with it. Prof. Sully concludes that the illusions in introspection "do not affect the value of the method more than the risk of sense-illusion can be said materially to affect the value of external observation;" (a) the errors are more limited than those of sense-perception and the feeling of certainty the same as that which the mind has of its own sensations from without. Further, the contrast between the inner and outer experience is much less than it seems, and when we compare our individual feelings through language, we find our inner experience is in all its larger features a common experience.

But, if this is so, why should this sharp distinction be drawn between a man's testimony as to his own mental condition and his testimony as to the mental condition of others? We are told that it is because the one kind is based on consciousness and the other on inference and we have seen what consciousness means: it remains now to examine what this 'inference' really is.

¶₄₅ Prof. Sully calls it 'Insight' and describes it as the 'intuitive' process by which we apprehend the feelings and thoughts of other minds through the external signs of movement, vocal sounds, etc., which make up expression and language. (b) It is often, but not always, a process of inference involving a conscious reference to our own similar experiences; for the infant mind seems to have a certain degree of instinctive or inherited capacity to make out the looks and tones of others. As life progresses, however, much of this interpretation comes to be automatic or unconscious, and the reading of others' feelings approximates in character to an act of perception. He therefore defines intuitive insight as that instantaneous automatic or unconscious mode of interpreting another's feelings, which occurs whenever the feeling is fully expressed and when its signs are sufficiently familiar to us. It closely resembles sense-perception since it proceeds by the

Insight, the method of apprehending others' feelings.

(a) *Ibid.*, pp. 208-211.

(b) *Ibid.*, p. 217.

interpretation of a sense-perception by means of a representative image, it differs from it and is nearer introspection, because while in the former case the process of interpretation is a reconstruction of external experiences, in the latter it is of internal experiences.(a)

An illusion of insight is a quasi-intuition of another's feelings which does not answer to the internal reality
 Illusions of in- sight. as presentatively known to the subject himself,
 and may arise, as in the case of introspection, either by way of wrong suggestion or of warping pre-conception. Our insights are determined by previous experience, association and habit, and an illusion is thus a wrong interpretation of a new or exceptional case. We are liable to be misled by the conscious deception of others, and we may also too hastily project our own feelings and thoughts into other minds, risks to which we are not subject in introspection.

Now if we consider the nature of the process as explained
 Inference. above, it does not seem to be legitimately
 described as inference, unless by 'inference'
 is intended something different from what is ordinarily understood by that term. For there is a form of sensuous inference which is not the same as intellectual inference, and it is the latter process to which allusion is made when the distinction is talked of between 'matter of fact' and 'matter of opinion'(b): sensuous inference is involved in every act of perception, and is sometimes called unconscious inference. We shall attempt to make the distinction clear by a few quotations.

"If," says Prof. James, "every time a present sign suggests an absent reality to our mind we make an inference, and if every time we make an inference we reason, then perception is indubitably reasoning. Only one sees no reason in it for any unconscious part. Both associates, the present sign and the contiguous things which it suggests, are aboveboard, and no intermediary ideas are

(a) Sully, *op. cit.*, pp. 217-220.

(b) Ameer Ali and Woodroffe, *op. cit.*, pp. 378-380.

required." If, however, what is meant is that perception is a *mediate* inference and that the middle term is unconscious, he denies this as follows:—"Since the brain-process of 'this', the sign of A, has repeatedly been aroused in company with the process of the full object A, direct paths of irradiation from the one to the other must be already established, and although roundabout paths may also be possible, as from 'this' to 'those,' and then from 'those' to A (paths which would lead to practically the same conclusion as the straighter ones), yet there is no ground whatever for assuming them to be traversed now, especially since appearance points the other way."^(a)

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So Prof. Stout writes "If we define it (*i.e.* inference) as a mental construction issuing in a judgment or belief, then undoubtedly inference is involved in sense-perception. But it will be generally admitted that this definition is too wide. We may try to amend it by saying that inference is a mental construction which both has its points of departure in a judgment and issues in a judgment. On this view we should have to refuse the title to merely perceptual process, however constructive it may be. But this does not touch the essence of inference. This involves a clear distinction of reason and consequent, and the apprehension of their connection.....what ultimately compels the inference is the special nature of the whole which is presented as the result of the constructive process."^(b)

Binet indeed holds that the mental process in perception is really the same as in reasoning, and if so, this would *ipso facto* do away with the distinction of inference and non-inference relied on in the passage quoted on Evidence. Thus he says "The mental process in the case of external perception belongs to the class of *unconscious* reasoning. But little importance need be attached to this characteristic; for there is really one method of reasoning, and the study of unconscious reasoning leads us to conclusions which are applicable to all kinds of ratiocination. These conclusions

(a) James, *op. cit.*, Vol. II, pp. 111-112.

(b) Stout, *Analytical Psychology*, Vol. II, p. 71.

are : that the fundamental element of the mind is the image ; that reasoning is an organisation of images, determined by the properties of the images themselves, and that the images have merely to be brought together to become organised, and that reasoning follows with the inevitable necessity of a reflex.”(a)

We prefer, however, to keep the distinction between the two kinds of inference already referred to, the inference being in the one case implicit or unconscious and in the other mediate or conscious, a distinction which has been well described by Prof. Sully : “ Our first judgments are intuitive, the element of inference being implicit only and not distinctly realised in thought. As intelligence develops and thought grows more explicit, the differentiation of intuitive and reasoned judgments becomes clearer.”(b) In implicit reasoning the mind passes from one or more old experiences some or all of which are distinctly recalled according to circumstances, to new ones, without seizing the general rule or principle involved in the procedure.(c)

Now that the writers on evidence do not by the term ‘inference’ intend to denote this implicit or unconscious reasoning is indicated, *e.g.*, by a passage like the following “ in all supposed statements of facts the witness really testifies to the opinion formed by the judgment upon the presentment of the senses,”(d) for such evidence is held to be admissible ; and again, “ the opinions of ordinary witnesses derived from observation are admissible in evidence when, from the nature of the subject under investigation, no better evidence can be obtained, or the facts cannot otherwise be presented to the tribunal, *e.g.*, questions relating to time, quantity, number, dimensions, height, speed, distance or the like.” (e) But they appear sometimes to confuse this species with mediate or conscious inference, and we think that this has been done in the passage we have been criticising. The real

(a) Binet, *Psychology of Reasoning*, p. 3 ; *cf.* also pp. 80, *et seq.*

(b) Sully, *Outlines of Psychology*, p. 283.

(c) *Ibid.*, p. 286.

(d) Ameer Ali and Woodroffe, *op. cit.*, p. 378.

(e) Taylor on Evidence, § 1416.

reason why the law permits a man to testify to his own mental condition but not to that of another man, if such be the fact, is, we imagine, because he is supposed to have intuitive or certain knowledge of his own mental state, but only to be able to observe the mental state of others with less certainty. So far as inference and consciousness are concerned there is no more objection to his deposing that he perceived another man to be angry than there is to his saying that he himself was in a state of anger.

9. It is probably merely owing to the capriciousness of legal decisions in the past that the writers on evidence have had to invent explanations of this kind to account for them, but it is unfortunate that through ignorance of Psychology they have provided reasons which will not bear examination. It is said for example that "statement of opinion is, therefore, necessarily involved in statement of fact" and that it is erroneously supposed to be an 'opinion' when, owing to the phenomena being too numerous or intangible to permit of correct or effective individual statement, witnesses are permitted to state simply the impression such phenomena produced in their minds. This is simply another method of stating facts." And it is alleged that this is the reason why "a witness can testify as to whether a person appeared to be in 'good health' or the reverse; or seemed 'hostile' or 'friendly'; or appeared 'intoxicated'; or looked 'excited'; or 'scared', 'old' or 'young'; or was of a particular age, 'pleased' or 'agitated'; or that two persons seemed to be 'attached' to each other, etc." (a)

One is tempted to ask whether, if these are 'facts' and not 'opinions,' there is any difference in the meaning of the two terms, or how the 'impression' produced on the mind by observed facts differs from one's 'opinion' concerning the facts one observes? Is not one's opinion always the impression made on one, *i.e.*, if we are to adhere to the ordinary signification of words?

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 378.

Or, again, how can it be said that a witness may say that another looked 'excited' or 'intoxicated' because this is only 'another method of stating facts,' but he may not testify to the mental condition of others because such a statement would be based on an inference? (a) Surely the one statement is directly contradictory of the other, and the weakest of possible reasons is suggested for treating the two cases differently. If it is necessary to state the facts only which give rise to the conclusion that a man is insane, and you may not say simply that he seemed to you insane, on whatever grounds of evidence or common sense are you allowed to say that a man seems to you intoxicated or excited, without stating the facts which give rise to such a conclusion? To say that the one is an inference and the other is not but only 'another method of stating facts' appears to be nothing better than solemn trifling.

NOTE on the attitude of some persons towards hyperæsthesia and any unusual psychological phenomenon.

It is not improbable that some readers may regard it as extravagant or foolish to even take into consideration such matters as hyperæsthesia, hypnotism, thought-transference and the like in connection with legal evidence and the decisions of the law Courts. If so, we must protest against such an attitude. It has been the fashion to denounce Occultism, Spiritualism, Theosophy and similar studies as fanciful or even imposture, because of the *explanations* which they offer or pretend to give of the phenomena they investigate, and because their followers have sometimes descended to trickery in order to produce the appearance of such unusual events. But this excuse no longer exists when we have a body of facts sifted and investigated by a number of men whose integrity is above suspicion, and who have special qualifications for the task to which they have devoted themselves, as in the case of the Psychological Research Society and similar associations. Those who have read the evidence and are competent to judge have, we may say, unanimously admitted that instances have been

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 380, with which compare p. 378.

established by these enquirers of the occurrence of manifestations of unusual powers, such as are referred to in the text, whatever the true explanation of them may be.

To class the results of these labours with the achievements of the Spiritualists and Theosophists and reject them forthwith without any examination, is to our mind equivalent to exhibiting a complete lack of discrimination. It is no sound argument to say that in such matters the general opinion of the day should be accepted without challenge and that this opinion is against the existence of such phenomena. For the popular opinion is in this case that of the non-expert portion of the community on matters that require expert knowledge, and if you are incompetent to form an opinion yourself on any matter, it is absurd to adopt the less rather than the more learned opinion on the subject. Sir James Stephen no doubt has advocated the method of deciding truth and falsehood according to the views held by the bulk of the community, and has on this ground justified convictions for witchcraft by juries in the past,^(a) and this is a very parallel instance. He argues that it was the duty of a jury to refuse to consider what were then the merely fanciful speculations which denied the existence of witchcraft, and in consequence of this many innocent persons were convicted apparently rightly in his opinion. In just the same way now, by a refusal to examine into the question of the existence of the unusual phenomena to which we have drawn attention, because the bulk of the community after no serious enquiry decline to believe in them, true statements may be, and doubtless sometimes are, disbelieved and injustice is done. We are now at the stage in which those who assert the existence of such phenomena are held by the bulk of the community to indulge in fanciful speculations, but before we determine to adopt this view we may remember that in the case of witchcraft such persons proved to be right ; and may therefore pause to consider whether it will not be wiser to first study what the experts have said on the subject.

(a) See Chap. VIII, para. 11 of this book.

CHAPTER VI.

THE NORMAL MAN.

The doctrine of the normal man as described in cases of negligence—Reason of the adoption of the doctrine—Claim of the doctrine to provide a general or universal rule—The theory stated to be a general idea—the nature of general ideas considered—How the theory is sought to be applied—Denial that the general rule is ever in fact applied—What is applied in its stead—Denial of any kind of existence to the normal man—Admissions of legal writers inconsistent with their theory—The normal man must vary according to circumstances—Admissions of legal writers which bear out the contentions of the text—Attempts to apply an impossible test cause injustice—Errors of the framers of the doctrine.

WE shall next discuss a principle of some importance in law which will be referred to in these pages as the doctrine of the 'normal man.' In one shape or other it occurs in many connections, as will become apparent in the course of the discussion, but, as it is perhaps most prominent in the law relating to cases of negligence, we shall look first for a description of it there. It will be found to be frequently linked with another doctrine, *viz.*, that of 'natural and probable consequence,' to which we shall often have occasion to refer, and the normal man will be found to bear more than one title.

He is sometimes known 'as the reasonable man' or 'a reasonable man,' sometimes as 'the man of ordinary prudence,' or again he will appear as 'the man who displays common care and caution' or as 'the man of ordinary sense.' But under these various aliases there is a common feature, namely, that he does not correspond to anybody in particular in everyday life, but is rather a type with whom everybody may be compared, and it is for this reason that we have described him as the 'normal man.'

2. If the reader will refer to Sir F. Pollock's treatise on the Law of Torts, he will find a kind of description of him given here and there piecemeal, and for want of a more explicit definition, we shall reproduce below some passages from that work.

“The doctrine of ‘natural and probable consequence,’” writes Sir F. Pollock, (a) “is most clearly illustrated, however, in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight : it has been defined as ‘the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.’ Now a reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. [The reasonable man, then, to whose ideal behaviour we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. [He will order his precaution by the measure of what appears likely in the known course of things. This being the standard, it follows that if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability, and the statement proposed, though not positively laid down, in *Greenland v. Chaplin*, namely, ‘that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur,’ appears to contain the only rule tenable on principle where the liability is founded solely on negligence.] And again when defining

(a) Pollock on Torts, 6th Edition, pp. 39, 40.

negligence, (a) 'the general rule was thus stated by Baron Alderson: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do' This, it will be observed, says nothing of the party's state of mind, and rightly. . . The question for judges and juries is not what a man was thinking or not thinking about, expecting or not expecting, but whether his behaviour was or was not such as we demand of a prudent man under the given circumstances. Facts which were known to him or by the use of appropriate diligence would have been known to a prudent man in his place, come into account as part of the circumstances. *Even as to these the point for actual knowledge is a subordinate one as regards the theoretical foundation of liability. The question is not so much what a man of whom diligence was required actually thought of or perceived, as what would have been perceived by a man of ordinary senses who did think.*'

The italics at the conclusion of this passage are ours, as it is desired to draw special attention to the words: they are a prominent part of the doctrine, for it is only as a matter of evidence and practice that proof of actual knowledge is considered to have importance. Thus the same writer continues "as matter of evidence and practice, proof of actual knowledge may be of great importance. If danger of a well-understood kind has in fact been expressly brought to the defendant's notice as the result of his conduct, and the express warning has been disregarded or rejected, it is both easier and more convincing to prove this than to show in a general way what a prudent man in the defendant's place ought to have known." (b) The admission as to the more convincing character of the proof of actual knowledge may however be noted in passing.

(a) Pollock on Torts, 6th Edition, pp. 420-1.

(b) *Ibid.*, pp. 421-2.

We will cite one more passage as it appears to give the reason for the adoption of the doctrine in question.

Reason of the adoption of the doctrine. “We have assumed that the standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man—the average prudent man, or, as our books rather affect to say, a reasonable man—standing in this or that man’s shoes.” (a) The author then refers to the case of *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468; 43 R. R., 711, in which a hayrick had caught fire, and the jury had been directed “that the question for them to consider was whether the fire had been occasioned by gross negligence on the part of the defendant,” and “that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.” A rule for a new trial was obtained on the ground “that the jury should have been directed to consider, not whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted *bonâ fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence.” The Court unanimously declined to accede to this view. They declared that the care of a prudent man was the accustomed and proper measure of duty. It had always been so laid down, and the alleged uncertainty of the rule had been found no obstacle to its application by juries. It is not for the Court to define a prudent man, but for the jury to say whether the defendant behaved like one. “Instead of saying that the liability for negligence would be co-extensive with the judgment of each individual which would be as variable as the length of the foot of each individual—he ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.” Sir F. Pollock then

(a) Pollock on Torts, 6th Edition, pp. 422-4.

cites, apparently with approval, an American decision, *Commonwealth v. Pierce* (1884), 138 Mass. 165; 52 Am. Rep. 264, in which it is said "If a man's conduct is such as would be reckless in a man of ordinary prudence, it is reckless in him. Unless he can bring himself within some broadly defined exception to general rules, the law deliberately leaves his personal equation or idiosyncracies out of account, and peremptorily assumes that he has as much capacity to judge, and to foresee consequences as a man of ordinary prudence would have in the same situation."

It thus appears that it is claimed for the doctrine that it can be generally or universally applied, where-
 What the doctrine claims to do. as the test of the man's actual knowledge or capacity displayed in each case must continually vary, that it is sufficiently well understood that a court need not define it, but juries can apply it without any instructions and in fact have always done so, and that the court may assume that every man has a capacity to judge events equal to that of the man of ordinary prudence.

3. As stated in the text-book the doctrine appears plausible at all events in some respects : it has an appearance of reducing to simplicity and providing a general rule or standard. But doubt arises when we attempt to see how it is actually applied, and the first question that one is disposed to ask, is whether as a matter of fact it is ever put into actual application? To determine this we must first consider the nature of this standard. The 'normal man' regarded as an idea can hardly be that of a concrete individual, for, if it were so, it could not boast of general applicability, and further, we are expressly told that the law deliberately leaves the personal equation or idiosyncracies of the individual out of account. It must therefore be taken to be a general or universal or abstract idea, for if, with Mr. Hobhouse (a) we admit an indeterminate idea,

Objections to the doctrine. Analysis of the idea contained in the normal man.

(a) L. T. Hobhouse, *Theory of Knowledge*, pp. 97, 98.

such an idea is, in his words, ‘*de facto* general, if it is on various occasions applied to distinct individual cases.’ It thus seems necessary to have a clear conception of what a general idea is, in order to subsequently consider the manner of its application to individual instances.

Most Psychological writers have a theory of general and universal ideas, and they do not all agree as to what they are or how they are formed: General ideas. there is not however any real dispute as to the fact that they arise through a comparison of individual instances, by which the common or like-characteristics are retained, and the unlike ones either merely disregarded, as Bain said (*a*), or definitely recognised as irrelevant as Prof. Stout insists. (*b*) It is owing to this dropping of the particular details that the charge of vagueness has been brought against generic images by the late Prof. Huxley who compares them to what one sees in dreams or in the twilight (*c*) and, if they are really of this vague character, it would not be surprising that the ‘normal man’ was described in the case quoted above as a ‘standard too uncertain to afford any criterion.’ This however appears to be a misapprehension: the indefinite feature about general ideas may be said to consist in a kind of background termed by Prof. James the ‘psychic fringe’ (*d*) and by Prof. Stout ‘the apperceptive system,’ but it is not to this that the attention is directed. It is rather because they are not attended to that these elements appear vague. “General and typical ideas exist therefore in the sense that we are able to concentrate the attention on certain elements on the individual idea, so that a weaker light falls on other elements.” (*e*) To illustrate however the importance of the background we may quote Prof. Stout “the universal element in intuitive thinking is never itself attended

(*a*) Bain, *Mental & Moral Science*, p. 177.

(*b*) Stout, *Analytical Psychology*, Vol. II, p. 176.

(*c*) Huxley’s *Hume*, pp. 92-94.

(*d*) James, *Principles of Psychology*, Vol. I, pp. 472, 477.

(*e*) Hoffding, *Outlines of Psychology*, p. 168.

to in contradistinction from its particular embodiment: it is to be found only in the apperceptive activity which gives interest and significance to the serial process as a whole. . . . an apperceptive system which has become organised in the course of previous experience. This system is the unity in which are combined the connected products of many particular experiences. It is therefore universal. But its universality is exhibited only in the general plan of synthesis by which particular objects of attention are interconnected so as to form an intuitional whole. The universal, as such, is not distinguished and identified.” (a)

The question in which we are interested is how this universal or general element is applied in any given concrete case. It was maintained by Bishop Berkeley that if we tried to picture to ourselves an abstract idea such as ‘man,’ ‘humanity,’ &c., we did as a matter of fact always call up the image of an individual with some particular shape and colour,^(b) and it seems now to be generally admitted that it is impossible to intuit the general. For example Hoffding says, “that general outline or pattern which we think of as filled up in different ways, cannot in itself be pictured. It shares the fate of all general ideas and requires an individual representation,” (c) and speaks of the name as a substitute for the impossible intuition. So Wundt’s view is that we have a particular idea but an accompanying consciousness that it has only a vicarious value, and that any other particular idea which belonged under the same concept could just as well be put there. When we do think of the concept ‘man’ in isolation, we have before us in our consciousness either the image of an individual man or the word ‘man’ (as vicarious sign), or perhaps a complication of the optic and acoustic image, and in all other cases, i.e., except when we think of ‘man’ without reference to any

(a) Stout, *op. cit.*, Vol, II, p. 188.

(b) Berkeley, *Principles of Human Knowledge*, Introduction, §§ 10, 14.

(c) Hoffding, *op. cit.*, pp. 172, 173, 186.

context of judgment, the corresponding idea would be simply and solely a concrete particular idea.(a)

4. So far then we seem to have reached the result that when we think of a general idea we must either imagine some individual or we must have before us the word which denotes the class. Now, if the judge or jury who are applying the test of the 'normal man' have in their minds any particular person evidently the test *ipso facto* loses its generality, for the individual cannot be separated from his surrounding circumstances and still remain an individual in any intelligible sense. There would here seem to be a dilemma for the man who maintains that he has a general standard in the 'normal man' by which to judge; if you abstract from the individual sufficiently to give him generality, nothing remains that you can picture, if on the other hand you leave him so definite that you can picture him, he is no longer of universal application for the purposes of a test. It has, however, been argued by Dr. Ward that it is useless to ask what we imagine when thinking, *e.g.*, of triangle, or man, or colour, because we never do attempt to fix our minds in this manner upon some isolated conception. In actual thinking ideas are not in consciousness alone but as part of a context, and when the idea 'man' is present, it is always in some proposition or question as 'man is the paragon of animals.' Hence "what is present to consciousness when a general term is understood will differ, not only with a different context but also the longer we dwell upon it: we may either analyse its connotation or muster its denotation, as the context or the cast of our minds may determine. Thus what is relevant is alone prominent, and the more summary the attention we bestow the less the full extent and intent of the concept are displayed." (b) He then explains that the word acts as a bond which brings into the foreground of consciousness when necessary those elements—whether they form an intuition or not—which are relevant to the concept.

(a) Wundt, *Human & Animal Psychology*, pp. 309-311.

Encyclopædia Britannica, 9th Edition, Vol. XX, pp. 76, 77.

(b) J. Ward, *Article Psychology*,

Now, it is not our intention to deny that we do sometimes think by means of words only, or at least without any appreciable image resulting, but it does not seem to be possible to deliberately use as a test a conception such as that of 'the man of average prudence' without in some way unfolding further to ourselves the meaning of the notion, and we do not admit that this can be done by merely repeating the name. Even Dr. Ward allows that in thinking we work ultimately with the ideational continuum: the word is but a symbol, a peg on which to hang ideas; its great utility lies in its applicability to an indefinite number of individual objects, and we are thus able by means of it 'to view a mental image as presenting features common to it and other presentations. In this way the image, though in itself an image particular and concrete becomes representative of an indefinite group of like things, that is to say of a class.' (a)

5. Our own belief is that consciously, sub-consciously or unconsciously, the judge or the juryman does in each case when he attempts to apply his test have in his mind a concrete individual who is no less a person than himself; this is his mental image, and the question which he really asks himself is, does the defendant appear to *me* to have exercised prudence or not? Should I have done the same, if I had been in his place? And he answers this to himself, without any reference to any general standard or general rule at all, but merely according to his own individual experience and the idiosyncracies of his own particular disposition. Hence it results that so far from the test of 'the man of average prudence' being a general and universal one it varies with each individual who applies it, and the learned Chief Justice in the case of *Vaughan v. Menlove* quoted above accurately described his own test when using the phrase 'as variable as the foot of each individual.'

In other words the standard of the 'normal man' is simply neglected altogether and another standard is substituted for it,

(a) Sully, *Outlines of Psychology*, p. 264.

and this is the real explanation of why "the alleged uncertainty of the rule has been found no obstacle to its application by juries," and why it had been found unnecessary for the Court to define a prudent man.

We shall shortly give some reasons for the view expressed above, but have first to consider an objection which no doubt will be raised, that when it is said that the judge and juryman decide entirely according to their individual experience, the fact is ignored that their experience includes the general rule; the experience is in fact 'the psychic fringe' of Professor James and the 'apperceptive system' of Professor Stout alluded to above as forming the universal. It is so far allowed that by constantly observing and comparing instances in which prudence or reason is displayed by individuals, a general idea of prudence could be obtained. As Professor Sully describes it, first of all a number of concrete images are welded together into a generic image which is thus formed by assimilative cumulation. "By such assimilations a cumulative effect is produced which has been likened to that of the superimposing of a number of photographic impressions taken from different members of a class (*e.g.*, criminals) whereby only common features attain to distinctness, and so a typical form is produced." (a) It is this cumulative effect which is the background or experience of the individual, and in virtue of which he is able to *recognise* the prudent individual when he sees him, to say in fact whether prudence has or has not been displayed. This no doubt would answer to M. Taine's description of his abstract idea of the *Araucaria* plant "but my abstract idea corresponds to the whole class: it differs then, from the representation of an individual. Moreover my abstract idea is perfectly clear and determinate; now that I possess it, I never fail to recognise an *Araucaria* among the various plants which may be shewn me; it differs then from the confused and floating representation I have of some particular *Araucaria*." (b)

(a) Sully, *op. cit.*, p. 255.

(b) Taine on *Intelligence* (N. Y.), Vol. II. p. 139.

There seem, however, to be two replies to this objection: Prudence, Reason or Judiciousness consists in the application of certain principles to the complicated realities of life. It is in Aristotle *φρόνησις* equivalent to practical reason, and has to do with particulars in the sphere of action, and not with universals, (a) and Sir F. Pollock expressly compares the average prudent man with the Aristotelian use of *δ φρόνιμος* in determining the standard of moral duty. (b) Being then so essentially relative to the occasion, as prudence is, and as such liable to indefinite variations, we have great doubt whether any such general idea of it, stripped of all its surroundings, could be formed, as *e.g.*, M. Taine formed one of the *Araucaria* plant. Such a general idea as could be created in the way explained above, would not be of much use for application to a new concrete case, and certainly would not correspond to what the lawyers profess to have in their standard of the 'normal man,' that is to say, a definite test capable of immediate application to any individual instance without need of any instructions as to its use.

Secondly, granting the formation of the notion required and allowing that each individual's experience has equipped him with it, we do not see how this would advantage 'the normal man' theory. What guarantee is there that the general notion which each has formed of prudence will correspond? Even though every exhibition of prudence may have some common characteristic, it does not follow that each individual will see it in the same light: neither does every man have the same experience nor yet the same mental endowment or education, and therefore, to assume that each must form for himself the same idea of Reason or Prudence is an evident absurdity. It is not a case which could be compared to men's notions of legal right and wrong, for there they have a code which is definitely laid down and to which they must conform: but with respect to prudence it is expressly said, *e.g.*, in the case of *Vaughan v. Menlove* already cited, that 'it

(a) Aristotle, *Ethics*, Bk. VI.

(b) Pollock on *Torts*, p. 422, note 1

is not for the Court to define a prudent man,' nor do we know of any law in which any such definition has been given.

Just as morality is relative and men's notions concerning it are everywhere different, so also must it be with prudence, and such a general notion of it as men are able to form will almost certainly vary in each case. But if so, how can the 'normal man' appearing in a different light as he will to each judge and juror, claim any longer not to vary? Or again, if the 'normal man' as represented by the general idea of prudence, is the same in each individual, what need any longer of his existence? Why not simply instruct each judge or jurymen to decide as it seems good to him, because it will also seem good to everyone else, ex-hypothesi each having the same idea of prudence?

6. It thus appears that neither in the form of a general image nor yet under the guise of the accumulative effects of past experience can the 'normal man' be said to have any existence in the minds of either judge or jury: that he exists outside any individual's mind whether in the regions of 'noumena,' 'things in themselves' or other like fictions we do not suppose to be asserted by anyone either in or outside of a legal text-book, many as are the fictions which they contain. That this is recognised by some lawyers is shown by the following passage: "There is no absolute or intrinsic negligence. It is always relative to some circumstances of time, place or person,"(a) and the same must be true of prudence the correlative of negligence.

We will now briefly assign our reasons for holding that the judge and juror in each case makes a mental image of himself when deciding the questions at issue.

It has been shown that if he could form a universal notion of prudence, it would be practically useless of application, and, although told to apply the standard of the 'normal man' no definition of such is given him by the Court—for the simple reason as it ap-

(a) Dr. Rashbehary Ghose, Law of Mortgage in India, 3rd Edition, p. 488.

pears to us that the Court is unable to define him even if it would—what therefore would he be likely to do under such circumstances? Obviously he will be forced to do the best he can with his own experience, and decide as his own inclination suggests, taking himself as the test.

In support of this view the following passages may be quoted: "Inasmuch, however, as we have no direct experience of what other persons actually feel, we can only gain the information by conceiving what we should feel, if we were in their place,"(a) and again to the same effect, "as we have no immediate experience of what other men feel, we can form no idea of the manner in which they are affected, but by conceiving what we ourselves should feel in the like situation."(b) Under the term 'feel' these writers would no doubt include 'thinking' and similar attributes of the reasonable man.

Nor is there anything astonishing in his so doing: no one would admit that he was not a reasonable man, and therefore when pressed it comes to this, that the 'ordinary' man is any one outside an asylum and varies according to each individual in the jury-box.

7. Indeed, one is disposed to think that jurors are sometimes actually directed to do what we hold they in fact always do, *e.g.*, commenting on the case of *Metropolitan Railway Company v. Jackson*, 3 App. Ca., 193, 47 L. J. C. P., 303 (1877), and the direction there given by Lord Cairns, Sir F. Pollock remarks "strictly the jurors have to say not whether negligence ought to be inferred, but whether, *as reasonable men* they do infer it."(c) Surely this is nothing but an invitation to regard themselves as the type of 'the reasonable man' for we cannot take the words to be merely otiose, and the learned author could hardly imagine that these men could project themselves out of their ordinary state of mind and take on a foreign personality corresponding to that of the normal man! For even granting that the conception of the normal man has been reached, such an achievement would require a power of abstract thinking far above the abilities of the ordinary jurymen.

(a) Buckle, *History of Civilization*, Edition 1871, Vol. III, p. 310.

Sentiments. Vol. I, p. 2.

(c) Pollock on *Torts*, 6th Edition.

(b) Adam Smith, *Theory of Moral*

p. 432, note (x).

A similar indication that what is really taken as the standard is in some form or other an individual test, is given in s. 151 of the Indian Contract Act. It is there enacted as follows :—
 “In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.” Now, if the standard of the ‘man of ordinary prudence’ were an intelligible or applicable one, there would have been no need to add the words ‘take of his own goods . . . bailed :’ the real test, however, is contained in these words, and the rule simply is that a bailee must take the same care of the goods bailed to him as he would of his own. That standard can be applied, because everyone knows how much care he would take of his own goods, and the addition of the words ‘as a man of ordinary prudence’ makes just no difference at all to the way in which the section will be used. If they were altogether omitted no one would be any the worse, so far as utility goes, though perhaps they might be less mystified. It is true that it seems to have been held^(a) that the fact that the bailee’s goods were lost at the same time is not sufficient ground for acquitting him of negligence with regard to the bailor’s goods, but we submit that in the absence of proof of some most unusual conduct on the bailee’s part with respect to his own property, the contrary inference should be drawn, and if it is not, the failure to do so is due to a mistaken attempt to give some definite meaning to an impracticable phrase. †

We venture to point this out as one mischievous effect of endeavouring to apply an unmeaning or impossible test. Another example may be taken from s. 16 of the same act. ‘Coercion’ is there defined as the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to

Protest against attempts to extend the doctrine of the normal man.

(a) *Doorman v. Jenkins*, 2 A. & E., 256, quoted on p. 365 of Cunningham

& Shephard’s 9th Edition of Indian Contract Act.

the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. On this the Commentators remark (*a*) that in the Roman and English systems fear is not regarded as a ground for avoiding a contract, unless it is the present well-grounded fear of a man of *ordinary firmness* : they also quote a decision to the effect that "The fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that *ordinary degree of firmness* which the law requires all to exert," (*b*) and, finally, while admitting that in this act "the notion of coercion is purposely extended, and there is nothing to limit it to such acts or threats as might be supposed to exercise a constraining force upon a man of ordinary firmness," so enamoured are they of the doctrine in question that they go on to add "nevertheless the circumstance that the threats employed were not of that character would be ground for inferring that the person's consent was not really caused by them." We entirely dissent from this opinion, as it assumes that all individuals are alike in disposition or that if they are not, they ought to be. It seems to us clear that instead of drawing presumptions from what one chooses to regard as the normal man, and so in fact basing the decision on a law of averages, the circumstances of the particular case should be the only guide as to whether the person in question was or was not frightened into entering into the agreement.

The first contention then is that 'the normal man' has no real existence of any kind ; the second is, that if he does exist, he is not capable of application in the sense claimed, and that attempts to apply the notion have mischievous results. What is actually applied in his place, we have already explained. But we further assert that even if he did exist and could be applied at all, he would have to be applied in so many different forms, that to speak of him as constituting a universal standard would be simply futile, and

(*a*) Cunningham & Shephard's I. C. Act., 9th Edition, pp. 54, 55.

(*b*) *Skeate v. Beale*, 11 A. & E., 983.

finally that the application of such a standard must, on general grounds, result frequently in injustice.

8. The fact that in order to apply such a standard the normal man must necessarily take on different forms according to circumstances, will not take long to demonstrate. Indeed, it follows from the nature of prudence or reason itself and the relativity of its character already alluded to. For, surely no one will maintain that the same standard of prudence can be expected from a child, a woman, and a grown-up man; and it would therefore seem at the outset that we must postulate three separate standards, *viz.*, that of 'the ordinary child' 'the ordinary woman,' and 'the ordinary man.' But again we cannot stop even here; caution, prudence, reason and similar qualities are forms of self-control, which is against the natural instinct and the tendency of ideas to pass into action, and they come therefore only with the highest and most developed races. To seek to apply the same standard at all stages of development is to attempt the impossible: for no sane person can neglect the differences of temperament and race, and can really believe that the average Burman can be bracketed side by side with the average Englishman, and the same reason and prudence demanded from each on every occasion. Nay, to go even further within the race itself, are the ploughboy and the advocate, the cooly and the township judge to be treated alike, but must we not rather have a normal example of each class?

And here we must pause to point out what is actually going on at the present time. Taking ourselves, as we do, as the representative of the normal man, English barrister judges and men of another race who have never been among the people nor know anything of their language or customs, are daily referring to precedents taken from another country, and taking their own minds as the standard by which to judge whether the Burman villager has or has not been guilty of negligence; and yet, if someone described them as the same as a ploughboy or as a Burman

cultivator, they would be the first to resent it, and they would claim to be something higher at least intellectually, if not also morally. Or do these judges delude themselves into the belief that European and Asiatic alike, the ploughboy, the township judge, the advocate and even the pig—for it seems that Bramwell, B., had a standard also of ‘pigs of average vigour and obstinacy’^(a)—are somehow one and all included in that mysterious entity the normal man or pig? Either this, or they must claim to project themselves into the frame of mind of persons, and it seems even of animals, of whom and which they know nothing whatever, whenever it is required, or else they must confess that they are neglecting the ordinary facts of daily life and dealing with imaginary beings and imaginary circumstances.

If they assert the former, we will then refer the reader to our remarks on differences of race, experience and imagination, and pass on, after merely premising that the analogy of Aristotle’s *ὁ φρόνιμος* or *ὁ σπουδαῖος* (i.e., the prudent or good man), will not help them here, although Sir F. Pollock has called him to his aid.^(b) For the *ὁ σπουδαῖος* is the man imbued with the spirit of his community, as has been pointed out by Mr. Bradley,^(c) and can only say according to it what is right or wrong: he cannot say it for another community. It seems plain therefore that he certainly would not be represented for the Burman by the English Barrister Judge but rather by the Burman Myook or the village headman, whose opinions the Barrister Judge, usually scouts if they do not agree with his own. You cannot have a cosmopolitan *ὁ σπουδαῖος*, any more than you can a universal man of ordinary prudence, as we have already shewn. But if the latter be allowed, we will ask what kind of justice is likely to be administered under such circumstances, and whether it is not rather a high price to pay for the possession of a normal and universal rule?

(a) *Child v. Hearn* (1874), L. R.,
9 Ex., 176; 43 L. J. Ex., 109.

(b) *Pollock on Torts*, p. 422, note (1).

(c) F. H. Bradley, *Ethical Studies*,
p. 177.

Now, it does seem to be in a way admitted by some lawyers that the various considerations which we have enumerated cannot be left out of sight, but they do not appear to perceive how such admissions strike at the root of the universality and generality of their test. Thus, in his treatise on Contracts Sir Frederick Pollock writes: "Improvidence is nothing else than the want of that degree of vigilance which a man of ordinary prudence may be expected to use in guarding his own interest. Now, one man's deliberation and prudence are not the same as another man's, nor is the same man equally deliberate or prudent at all times. A man may enter into a contract with less deliberation than the average wisdom of mankind would counsel, or than he himself commonly uses, in affairs of the like nature, and yet the contract may be perfectly valid." And again, "Surprise or improvidence represents nothing but an opinion of the general character of a transaction, *founded on a precarious estimate of average human conduct.*" (a) Further, in the notes to s. 151 of the Indian Contract Act (b) we find "The Court has . . . to determine what a man of ordinary prudence would have done with his own goods under the circumstances. It must, therefore, take into consideration the state of society, the general usages of life, and the danger peculiar to the times, as well as the apparent nature of the object of bailment and the degree of care which it seems to require." Remarkable as this is for its omissions with respect to the individual, it does so far advance as to include the state of society, and the general usages of life within the scope of its enquiry, which gives an opening for differentiating between races and stages of development.

Sir F. Pollock, however, appears to go further, for citing a dictum of Grove, J., in *Smith v. Green* (1875), 1 C. P. D. at p. 96, that "normal or likely or probable of occurrence in the ordinary course

(a) Principles of Contract, pp. 634, 636.

(b) Cunningham & Shephard, *op. cit.*, p. 366.

of things, would perhaps be the more correct expression ;” he criticises it as follows :—“ But what is normal or likely to a specialist may not be normal or likely to a plain man’s knowledge or experience.” (a) This is a serious lapse from the path of Universality, and it is not the only one : to quote again from the same author : “ The normal measure of the caution required from a lawful man must be fixed with regard to other men’s normal powers of taking care of themselves, and abnormal infirmity can make a difference only when it is shown that in the particular case it was apparent. On the other hand it seems clear that greater care is required of us when it does appear that we are dealing with persons of less than ordinary faculty.” (b) Finally, he roundly asserts a kind of supplementary principle, which he expressly states is not to be taken as an exception or extension, but as a ‘ necessary application of the general rule,’ to which he gives the name of ‘ the particular duty of competence.’ “ This, it seems, is specially intended for skilful persons, and to use his own words “ the practical result is that the diligence required in the case in hand will be, according to circumstances, an ordinary man’s or some particular kind of expert’s.” (c)

The law of ordinary prudence has thus now become that of extraordinary prudence, and the caution against regarding it as an exception to the general rule was certainly needed. But surely it is time to abandon a principle when, in order to save it, you have to assert a supplementary law which is a direct contradiction of the main one. We sympathise with Sir F. Pollock when he complains of the difficulty he sometimes has in applying his standard of a reasonable man’s prudence, (d) and we do not in the least doubt it : or again we recognise his manful attempt to make the decision in *Eckert v. Long Island R. R. Co.* (1871), 43 N Y., 502 ; 3 Am Rep., 721, square with the theory of natural and probable consequences, though we were not previously aware that the law

(a) Pollock on Torts, p. 35 note (n).

(b) *Ibid.*, pp 440-441.

(c) *Ibid.*, p. 424.

(d) *Ibid.*, pp. 459, 460.

took such charitable views of mankind, (a) but we cannot allow that he has successfully accomplished his task.

9. It now remains to show that the application of the rule, if it were possible, would frequently result

Why the application of the general rule must often cause injustice.

in injustice. For this we will revert to the case of *Vaughan v. Menlove* previously cited

and quote again the argument by which a new trial was obtained, viz., that the jury should have been directed to consider "whether he (*i.e.*, the defendant) had acted *bonâ fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence." To this Sir F. Pollock objects that 'it misrepresents the rule of law: not the highest intelligence, but intelligence not below the average prudent man's, being required.' (b) This is true, but it does not affect the principle of the argument which appears to us to be entirely unanswered by the reasons which the Court of Common Pleas gave for rejecting the view urged. For either the defendant answered to the 'reasonable man,' in which case it was right for them to take his standard as the test, or he did not; and if he fell below the normal man, then you were evidently demanding a higher standard from him than it was possible for him to attain to. All men are not alike, and some men must clearly be inferior in prudence to the normal man, for he is avowedly the man of *average* prudence, and all averages are reached by taking the mean between inferiority and excess. Those, therefore, who seek to apply the test of the normal man must avowedly expect and preach what is for some men an impossibility, and it is of no use to assert that such men ought to have trained themselves beforehand to be the reasonable man, unless you can first show that all men even with training can reach that standard, and further what that standard is. How you will even set about proving such a problem, for ourselves, we are unable to conjecture.

(a) Pollock on Torts, p. 464.

(b) *Ibid.*, p. 423 and note (a).

It is not improbable that some lawyers will admit that there is much truth in what has been said, but will nevertheless maintain that the advantage or necessity of having one general rule is so great that it is advisable to employ it, even though some individuals may suffer injustice thereby. It is in anticipation of this that we have devoted so much space to an attempt to show that the general rule in question is a delusion, and is not as a matter of fact really applied at all, though vain and fanciful attempts are sometimes made to use it. And if the question be asked, why if it is not in fact used, we so strongly object to it? Our reply is, that not only do the attempts to use it in themselves do harm—of which examples have been given and more could, if necessary, be collected—but also that this sham standard by its very acceptance stands in the way of the adoption of a better one. Nor is it necessarily incumbent on us to suggest a new test, before condemning one that is bad: but we will go so far as to say that we regard any search for the real or typical expression of reason or prudence as fruitless: we should rather confine ourselves to the details of each particular case, and should ask how any given expression of it came to exist, and seek in each instance for some causal explanation.

10. The framers of the theory of 'the normal man' appear to have been mistaken on two points: they
Errors of the framers of the theory wrongly imagine that the individual can be isolated from his surroundings and remain the same, and they have further an erroneous conception of what a universal standard is. The first is the old fault of the Utilitarians when they founded their morality on the idea of each unit seeking his individual pleasure apart from all the other units, whereas the self is characterized, determined, made what it is by relation to others.(a) Or as Wundt puts it, the surrounding circumstances actually alter a fact: this is the law of relativity, applicable alike in sensations and all mental states:

(a) Bradley, *Ethical Studies*, p. 105; & *Appearance & Reality*, p. 425.

“we never apprehend the intensity of a mental state as if it stood alone.”(a)

Nor again can you make a universal standard by abstraction which will result in anything but a mere form. This also has been pointed out by Mr. Bradley, “that the good must be formal we might have seen by considering its character of a universal standard or test. Such a standard is a form or it is nothing. It is to be above every possible this and that, and hence cannot be any this or that. It is by being not this or that, that it succeeds in having nothing which is not common to every this and that, otherwise there would be something which would fall without its sphere; it would only be one thing among others, and so would no longer be a standard. But that which can be common to everything is not matter or content, but form only. As no material test of truth, so no material test of morality is possible.”(b)

Instead, however, of grasping this point our judges and lawyers have compromised between the form and the matter, and tried to unite two inconsistent elements in a universal rule; they have made their man typical or general, but the circumstances under which he is to act in particular. For the standard which they recommend is not how the normal man would act under normal or general circumstances, but under the given circumstances, *i.e.*, the circumstances of the individual whose case they are deciding. But for this addition of course the doctrine would be so transparently useless, that it would be idle to urge its adoption; and so it is that their test, or rather self-contradictory attempt at a test, has preserved the appearance of applicability. It is, however, only an appearance and cannot be otherwise, the nature of reality being what it is. “Roundly stated,” says Dr. Ward, “the real is always concrete, the symbolic is always abstract. The real implies individuality more or less; the symbolic is always a logical universal. Within the range of our experience the real implies always a history, that is, places and dates, converse with a concrete environment. The symbol

(a) Wundt, *Human & Animal Psychology*, p. 119.

(b) Bradley, *Ethical Studies*, p. 131.

is the creature of logic. If temporal and spatial relations enter into its definition or description, they are time and space co-ordinates with no vestige of chronology or topography about them.” (a) And again, “Life is wholly an affair of the real and individual : we cannot perform abstract acts or experience abstract events ; everything here has not merely general properties but a unique setting, and counts only so far as it has meaning and worth.” (b)

So long as political economy was regarded as an abstract science, like mathematics, which dealt with the ‘economic man,’ who was guided solely by considerations of wealth, so long it failed to have any influence in daily life because men felt its propositions to be inapplicable there. Just so with the legal doctrine of the normal man, it will not apply to daily life : but here, as lawyers will not allow that their business is not with real men and real conduct, and maintain that the legal sense is always the natural one, (c) they have striven by the use of supplementary laws and other devices to make their theory cover the facts of each case as it arises ; hence the theory itself has in the end been adapted and transformed, until from the stones which they are forced from time to time to add there results the existing legal mosaic, a fit and characteristic monument of their handiwork.

(a) J. Ward, *Naturalism & Agnosticism*, Vol. I, pp. 179-180.

(b) *Ibid.*, Vol. II, p. 170.

(c) Pollock on Torts, p. 421.

CHAPTER VII.

CAUSATION.

Importance in Law—Species of Causes—Causal Uniformity—Origin of the popular idea of cause—Change, unconditionality, spatial and temporal relations in Causality—Relevancy—Occasion, Opportunity, Condition—Instances of Cause in the Indian Evidence Act—Proximate and Immediate Cause—Necessary and probable consequences—Remoteness—Real, Decisive Cause—Examination of Cases illustrating the rule of necessary and probable consequences—Sir J. F. Stephen's treatment of Causation in cases of homicide examined—his attempt to use the criterion of directness and immediateness of connection—his confusion of motive and cause—his inclusion of intention in causation.

IN this chapter we are avowedly entering the region of metaphysics and the reader who is afraid of them is therefore advised to omit it. At the same time, if he chooses to persevere he will find references both to psychology and law, for causation is a subject with which psychology to some extent is forced to concern itself, and legal text-books usually attempt to handle it, though in a *dilettante* and inadequate fashion, as far as our experience goes.

This, indeed, is really somewhat surprising considering how important a part the causal conception plays both in legal evidence and other branches of law. Without it we should find it extremely difficult to arrive at any adequate idea of what "relevancy" means : in fact the original definition given of it was the connection of events as cause and effect. (a) Professor Edmund Robertson quotes the general definition of relevancy in Stephen's Digest as follows :—" Facts whether in issue or not, are relevant to each other when one is or probably may be, or probably may have

Importance of Causation in law.

(a) J. F. Stephen, Introduction to the Evidence Act, Edition 1893, 68.

been—the cause of the other, the effect of the other, an effect of the same cause, a cause of the same effect—or when one shows that the other must or cannot have occurred, or probably does or did exist or not ; or that any fact does or did exist or not, which in the common cause of events would either have caused or have been caused by the other,” and himself, regarding the causal connection as the key of the explanation of relevancy, remarks that the exceptions to the rule excluding collateral evidence in Stephen’s Digest, will be found to be all cases of the general rule of relevancy. “Some bond of connection as cause and effect will be found to have been established between them.”(a)

Section 7 of the Indian Evidence Act runs as follows :—
 “Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction are relevant.”

Turning to other branches, *e.g.*, that of civil liability for torts, we find a doctrine of ‘natural and probable consequences,’ a distinction between ‘immediate,’ ‘proximate’ and ‘remote’ causes, a doctrine of ‘reasonable and probable cause,’ &c., (b) all of which are important principles, while in the region of contracts ss. 14, 15, 18, 19 and 22 of the Indian Contract Act show the desirability of understanding causality. It is therefore unnecessary to go further in order to justify our introduction of so metaphysical a problem as that of causation.

2. The difficulty of causation is in part due to the different aspects in which it is viewed combined with the fact that these aspects are all described by one common name. Thus, Aristotle found it necessary to divide it up into four kinds, *viz.*, the Formal, the Material, the Efficient and the Final Cause. Of these, the first two have

(a) Article “Evidence” Encyclopædia Britannica, 9th Edition, Vol.

VIII, p. 740.

(b) Pollock on Torts, pp. 30, 36, 220.

dropped out of use, but the two last still remain, though it is only in Psychology, Metaphysics and some forms of Theology, that the Final Cause has any influence. Its basis, however, is like that of the Efficient Cause, in our own experience, *i.e.*, the experience of our own conscious adaptation of means to ends in our voluntary actions, (*a*) and the only place in law where this conception intrudes, so far as we recollect, is in the realm of motives and conduct. As these are fully treated of elsewhere, we shall not delay over them here, but shall be content to remark that the popular idea of cause is not derived from this species of causation which is usually rather expressed by the term 'end' or 'purpose.' It is easy, however, to confuse this notion with that of the Efficient Cause, and such a confusion appears to have taken place, *e.g.*, in the following note to s. 8 of the Indian Evidence Act :—"A motive is, strictly what its etymology indicates, that which moves or influences the mind. An action without a motive would be an effect without a cause, and as, to take for example criminal cases, the particulars of external situation and conduct will, in general, correctly denote the motive for criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence." (*b*)

When the Final Cause has been eliminated, there yet remains room for a confusion between the idea of the Causal Uniformity. Efficient Cause and the scientific conception of law. On this point we cannot do better than quote Dr. J. Ward, who has clearly pointed out that Scientific Causality excludes Efficiency : "But neither space nor matter, neither time nor motion, affords any place for causal activity in the only form of it of which we have any immediate knowledge. Hence, it behoves us to realise, what most expositions of causation ignore or deny—I mean that causation and

(*a*) G. E. Underhill, *The Use and Abuse of Final Causes*, Mind, N. S. No. 50, pp. 230-231.

(*b*) Ameer Ali and Woodroffe, *Indian Evidence Act*, 2nd Edition, p. 65.

causal uniformity are entirely distinct. An efficient cause is not necessarily uniform in its action, and uniformity of sequence does not directly imply such causal intervention.”(a) And again, speaking of nature, “the conception of efficient cause lies beyond its bounds; it recognises law, orderly sequence of events; but it neither asserts nor denies what we know as activity and passivity.”(b) “So soon as laws are defined as constant relations, so soon reason compels us to look beyond them, such a definition brings the ground and source of the relation nearer instead of removing them farther off. Relations may hold, but they cannot operate; they may subsist, but they cannot exist in the absence of the things to which they pertain.”(c) This distinction seems to have been overlooked or ignored in the definition of cause given. *e.g.*, in s. 14 of the Indian Contract Act: “Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake,” for such a definition appears consistent with mere co-existence or invariable sequence, and would in fact be an instance of causal uniformity rather than of causation as usually understood.

3. “Even if the terms,” says Sir F. Pollock, “were used by lawyers in a peculiar sense, there would be no need for apology; but the legal sense is the natural one.”(d) It is presumed, therefore, that when legal writers employ the term ‘cause,’ they intend by it what is usually meant in ordinary parlance. An effort must now be made to try and fix what this ordinary meaning is. The first step is to trace the origin of the plain man’s idea of cause, and this is almost certainly found in the notions of ‘force,’ ‘power’ and ‘constraint’: inasmuch further as we have a direct consciousness of this only in our actions and volitions, it is doubtless from the side of our

(a) J. Ward, *Naturalism and Agnosticism*, Vol. II, p. 241.

(b) *Ibid.*, p. 242.

(c) *Ibid.*, p. 278.

(d) Pollock, on Torts, p. 421.

own mental life that the conception is first obtained. "It is, indeed, only when we ourselves produce an effect by the use of our muscular powers that we have a direct consciousness of causal agency, so far as this involves the idea of force or power. Hence, it seems natural to suppose that the race and the individual acquire their first dim apprehension of the causal relation through the observation of their own actions." (a) Similarly, Professor Höffding: "We assume a causal relation whenever we discover that two phenomena are linked together in such a way that the one unavoidably makes its appearance when the other is given. According to the popular conception of the causal relation, one thing is the cause, another thing the effect. The difficulty which might be found in things supposed to exist independently having yet so much to do with one another as must be the case with cause and effect, is from this standpoint easily overcome. A creative or constraining power is attributed to the thing called 'the cause.' The causes are personified, have ascribed to them something analogous to the personal exertion of will." (b)

Not merely, however, is the causal relation derived from our own mental life, but it is in the first instance a purely subjective affair, *i.e.* it is simply the way we look at things outside us, as is clearly pointed out by Professor Stout: "The popular use of the word 'active' is roughly co-incident with the popular use of the word 'cause.' Among a group of factors which occur in a process leading to a certain product, agency is attributed to that which, for whatever reason, seems to play the most important, impressive or interesting part. A man run over and killed by a passing train may have been standing on the line by accident, or he may have deliberately placed himself there with a view to suicide, or he may have been pushed there at the critical moment by another person. In the first case we should probably say that

(a) Sully, *Outlines of Psychology*,
p. 276.

(b) Höffding, *Outlines of Psychology*, p. 209.

the train killed him : in the second that he killed himself, and in the third that the person who pushed him was the agent of his destruction. If he placed himself in front of the train in consequence of the ill-treatment to which he had been subjected by some one else, we doubt whether to regard the event as a suicide or as a murder. It is obvious that this mode of regarding agency is unscientific, inasmuch as it depends on the point of view which happens to be taken by the external observer. Where scientific explanation is required, each of the contributory factors concerned in a process must be regarded as active precisely in so far as it determines the nature of the result.”(a)

So also Dr. Ward says : “ It is not then in the relation of one *objective* change to another that we first find causation ; that is rather where we put it in order intellectually to assimilate or synthesise. The activity and passivity that are, at least *primâ facie*, facts of individual experience, constituting what we call the inter-action of subject and environment, we transfer by parity of reasoning to what we regard as the inter-action of object and object in universal experience.”(b)

It is important not to miss the point to be drawn from these quotations, viz., that the Causality is not so much in the events themselves as in what we choose to pick out as the cause from a number of antecedent phenomena. It explains much, including the distinction between cause and condition, as we shall illustrate later, and therefore at the risk of being tedious we shall enforce it by further quotation now. Thus Mr. Bradley, speaking of the attempt to define the cause as ‘ the sum of conditions,’ says, “ If we want to discover a particular cause (and nothing else *is* a discovery), we must make a distinction in the ‘ sum.’ Then, as before, in every case we have conditions beside the cause ; and, as before, we are asked for a principle by which to effect the distinction between them. And, for myself, I return to the state-

(a) Stout, Analytic Psychology,
Vol. I, p. 144.

(b) Ward, *op. cit* , Vol. II, pp. 238-9.

ment that I know of none which is sound, we seem to effect this distinction always to suit a certain purpose; and it appears to consist in *our* mere adoption of a special point of view.”(a)

4. We have not, however, yet exhausted all the ideas which the plain man contrives to utilize at one time or other for his notion of cause. We have still to deal with the conceptions of ‘change,’ ‘unconditionality’ and the temporal and spatial relations. “We may regard cause as an attempt to account rationally for change,” says Mr. Bradley, (b) and again, “activity implies the change of something into something different”(c) but it is hardly necessary to linger on this, because it is obvious, to quote Professor Höffding, that “if everything were uniform and unchangeable we should have nothing about whose cause we could enquire, The relation of Causality presupposes the occurrence of an event.” We only notice it because it goes to enforce the idea of activity, which is the basis of the notion of Efficient Cause, the species to which the popular conception most corresponds.

Temporal and spatial relations, however, demand more attention. Uniform succession and co-existence will not alone produce what is meant by ‘cause’ in ordinary thought; there must be added also the notion of ‘enforcement’ as Professor Pearson calls it, *i.e.*, that idea of force, power, &c., which we spoke of above. (d) But they are nevertheless important ingredients: “Contiguity in space of the objects causally related and priority in time of the cause before the effect are the only relations directly discernible,”(e) and as regards ‘unconditionality’ the same writer remarks that it is part of the Causal relation and yet not the product of invariable repetition. “In its earliest form then, the so-called necessary connexion of Cause and Effect is perhaps nothing

(a) Bradley, *Appearance and Reality*, pp. 67-68.

(b) *Ibid.*, pp. 54. 64.

(c) Höffding, *op. cit.*, p. 56.

(d) Stout, *op. cit.*, Vol. I, p. 178.

(e) J. Ward, Article Psychology, *Encyclopædia Britannica*, 9th Edition, Vol. XX, p. 82.

more than that of physical constraint. To this no doubt is added the strength of expectation, as Hume supposed, when the same effect has been found invariably to follow the same cause. Finally when upon a basis of associated uniformities of sequence, a definite intellectual elaboration of such material ensues, the logical necessity of reason and consequent finds a place, and so far as deduction is applicable, cause and reason become interchangeable ideas.”(a)

Mr. Hobhouse has set out clearly what assumptions are ordinarily made as to the relations in question, *viz.*, (1) that the logical antecedent of an event is also its antecedent in time, *i.e.* that among the logical grounds of an event there is always one immediate temporal antecedent (the cause). Thus a fact may have any number of logical grounds or facts from which it can be inferred, but only one cause, and, (2) that antecedent and consequent must be in some close proximity in time and space which amounts really to this that cause and effect must be continuous with one another in space and time. It is true that we do often speak of a remote event as the cause, but the more accurately we think and observe, the more we fill up gaps in our sequences and reduce them from a series of jumps to a continuous change. If we cannot detect an apparent change between the facts which we regard as cause and effect, we fill up the gap with a latent process of some sort, *e.g.*, a disturbance which arises here and has effect there, must in some way have propagated itself all across the distance. (b)

We cannot reproduce here all Mr. Hobhouse's argument, but must be content to say that his conclusion is that time and space, as such, make no difference to the conditions determining phenomena, but that given Y we must get X at whatever time or place. Time itself is not a condition of the production of a fact. “In fact it is with causal as with all temporal succession the idea of

(a) J. Ward, Article Psychology, Encyclopædia Britannica, 9th Edition, Vol. XX, p. 83.

(b) L. T. Hobhouse. Theory of Knowledge, pp. 275, 276.

one event B following an event A involves a good deal of (mainly involuntary) abstraction. No event ever begins or ends ; but a process goes on which passes gradually from one phase into another. We ticket prominent or clearly distinct phases with separate names, and speak of them as different events ; but we must remember that, though in one sense they are different, there yet is no barrier. Hence the law of the ground gives us a hint for our conception of a cause as that which not merely goes before the effect, but, as it continues, turns into the effect. "(a) And again " Cause and effect are separate names, implying separability in thought and observation, but not indicating that the contents thereby denoted are, in fact, parted by any interval of time or space. In view of this, the cause is sometimes held to be identical with the effect, but it would be better to speak of the effect as the continuation of the cause, to say, not the effect *is* the cause, but that the cause *becomes* the effect. They form in reality one process or stream of existence passing before us. Certain points in the stream stand out with well-marked characters, and such of these as immediately succeed one another get spoken of as cause and effect, the interval being regarded somewhat obscurely as a blank, or perhaps as a latent process. In fact these distinctions are in *ordine ad nos*. To the eye of the universe the stream is one and unbroken, and there is no more or less of importance where each section is the total condition of what follows. Hence there is no more difficulty in speaking of causal connection as between the moments of a continued identity than in applying the same notion to a segment of a stream of change. "(b)

We fear that the reader who is unaccustomed to metaphysical thinking will not be able to follow this reasoning, but ' cause ' is a metaphysical notion, and space and time, if considered apart from metaphysics, are apt to land the man of common sense in difficulties. That they have done so in the region of law, as

(a) L. T. Hobhouse, *Theory of Knowledge*, pp. 277-8.

(b) *Ibid.*, pp. 449-450.

elsewhere, will become apparent later, and it is only by the adoption of some such view as that quoted above that we shall be able to clear away and avoid what are really serious errors.

5. Before proceeding further, let us briefly recapitulate the results of our analysis. The popular idea of Cause is that of Efficient Cause: it includes the notions of force, constraint and change, and implies that one event is preceded by an antecedent event proximately related to it in time and space, and the connexion between the two events is unconditional. But though causation is a continuous process, it is a mistake to suppose that those particular events, which as most prominent or interesting to us in the chain, are marked off by us as cause and effect, are necessarily adjacent in time and space.

It is assumed, as stated above, that the expression 'cause' as employed in law and legal treatises is intended to correspond with the conception of the plain man, and we shall now go on to examine such applications of it as have come under our notice.

Sir James Fitzjames Stephen referring to his definition of 'relevancy' already quoted, added a proviso that the words 'cause' and 'effect' must be taken in their widest acceptance. To this it has been objected that, even so, the definition does not include all facts which we know from our experience to be really relevant; and if the words are given a transcendent meaning based upon our knowledge that all things precedent have gone together to make up the state of things existing at any time and that no fact could ever have existed without the co-existence of every other fact that did exist at the same time, then the definition includes everything and so ceases to be a definition. Thus the statement that relevancy means the connection of events as cause and effect requires some addition, if the

Recapitulation of what is involved in the ordinary conception of cause.

Cause and Relevancy.

words are used in any ordinary sense, and some limitation, if they are given a transcendent sense.(a)

Now it is no doubt true that the state of the universe at one moment may be regarded as the cause of its state at the next moment, but to seek for the cause on those lines is to pursue what is impossible. As Mr. Bradley puts it “ It is only by a license that in the end both sides taken together can be abstracted from the universe. The cause is not the true cause unless it is the whole cause ; and it is not the whole cause unless in it you include the environment, the entire mass of unspecified conditions in the background. Apart from this you have regularities, but you have not attained to intelligible necessity. But the entire mass of conditions is not merely inexhaustible, but also it is infinite ; and thus a complete knowledge of causation is theoretically impossible.”(b) What we do therefore, is to seek out an effective and differential condition, and how we do it has already been explained : this is essential to progress, and its justification is simply its success and the impossibility of otherwise making any use of the causal conception. This is so well recognised that the objection quoted above, though we might expect it in a philosophical work, seems out of place in a legal treatise, and it certainly cannot be supposed that Sir James Stephen had any intention of understanding cause in this transcendent sense. At the same time the fact that such an objection has been raised and that Mr. Whitworth considered it necessary to propose alternative rules illustrates how needful it is to have a clear idea of what is intended by causation. If, as a fact, the causal connection, in the sense in which it is understood by the plain man, does not cover the whole meaning of relevancy, some addition must be made to the definition so as to include those relations which have been left out ; this is practically what has been attempted in ss. 6-11 of the Indian Evidence Act. But to juggle with the meaning of ‘ cause ’ and to speak

(a) Ameer Ali and Woodroffe, Indian Evidence Act, Introduction, pp. cxlii-cxliii.

(b) Bradley, Appearance and Reality, p. 336.

of using it in its widest acceptance without further explanation as though every one must necessarily understand what that means, will simply end in chaos and give the pettifogging pleader just the opportunity that he desires.

Among facts apparently relevant but not really so are classed transactions similar to, but unconnected with, the facts in issue. These are inadmissible in evidence, but as an exception to the rule we find the following statement:—"Further, in cases where causation is well known and regular as in the case of physical and mechanical agencies, the conditions of mental disease, the propensities of animals and the like, evidence of similar but unconnected acts is often admissible." (a) There are then quoted in the note, instances of horses being frightened by a pile of lumber, dogs killing sheep, sparks from engines igniting buildings, persons being considered insane because their ancestors were so, and allusions to the regularity of scientific instruments. It would hardly be possible to find a worse jumble of miscellaneous and dissimilar facts collected together under the head of causation.

In the first place we have the very confusion between causation and causal uniformity described by Dr. Ward (*vide supra*), for in mechanical agencies what is called causation is nothing more than invariable sequence. "But if nature be taken in its mechanical aspect only," says Mr. Underhill, "as consisting of the primary qualities of matter, Hume's Analysis is perfectly right. In this mechanical world causality, so far as natural science can know it, is mere succession: and the causality which Kant would attribute to nature is the efficient causality which we are conscious of in the actions of our own wills. . . . But with such causality mechanical science as such has nothing to do. . . . So long as we stick to quantities causality is merely the invariable sequence of consequent upon antecedent, nothing more nor less: for such sequence alone admits of mathematical determination in terms of number and quantity." (b) There is regularity no doubt

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 46 and note 6.

(b) G. E. Underhill, *Use and Abuse of Final Causes*, *Mind* N. S., 50, p. 229.

but not causation in the sense in which the plain man uses the term, and the same may be said of the scientific instruments. As regards the condition of mental disease it is not very plain how it is intended to be brought under any definition of causation, but from the illustration in the note it may be gathered that A would be inferred to be insane because he had shewn symptoms of insanity both before and after the time in question, and because his ancestors had been insane. That the previous—much less the subsequent—insanity caused the insanity in question seems an unnecessary way of putting the matter: either it was the same continuous insanity throughout, being a *latens processus* as Mr. Hobhouse calls it (*vide supra*) during the intervals of apparent sanity, in which case they are wrongly described as ‘similar but unconnected acts’ or else, if they really were not connected, it is an obvious error to speak of a causal relation which, whatever else it may do, at least posits a connection of some kind between the two events. Similarly, with respect to the insanity of the ancestors: it is only by supposing that the insanity was continuous from them to A, being transmitted by inheritance, that we have any right to speak of cause and effect. Otherwise, if it is a mere argument from resemblance as the description ‘similar but unconnected’ suggests, then the inference would be no stronger because it was A’s ancestors who had been mad than because B. C, D, &c., persons totally unrelated to him, had displayed like symptoms. But in the latter case, what would be the value of such evidence? It certainly would not prove any necessary connexion, though it might go—if supported by proof of other facts—to show some probability. As regards the disposition of animals we can only suppose that here again an argument is intended to be drawn from mere similarity, and as we treat of that fully elsewhere it is unnecessary to say more now, except that we cannot understand why it has been included as an instance of ‘cases where causation is well known and regular.’ You cannot get causality out of mere resemblance, and that is the end of the matter: as Professor Stout says “In no other case (*i.e.*, except the

law of similarity asserted by Bain) do we find that two distinct elements act upon each other merely because they resemble each other. Such a conception is unknown to science. We find a parallel to it only in the superstitions of magic, such as the belief that the melting of a waxen image will produce the decline and death of the person it resembles.”(a)

6. We now pass on to s. 7 of the Evidence Act which says that ‘facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.’ The learned Editors whom we have already quoted include all that they have to say on this in fifteen lines: they describe these classes of facts as connected with the transaction in particular modes, *viz.*, occasion, cause, effect, opportunity, which modes are really aspects of causation.(b) We must dispute that the affording of an opportunity for an act can alone be called the cause of the act if we are to retain any clear meaning of cause; otherwise there might be such a thing as a cause without an effect, for every opportunity is not taken advantage of, in which case nothing will result. This indeed is really admitted in the Commentary where it is said “There can be no crime without the opportunity; but there is a wide gulf to be bridged over by evidence between opportunity and commission.” But what if that gulf is not bridged? The opportunity was nevertheless given, and was, therefore, a cause: will it still be considered one?

The truth is we want some distinction drawn between occasion, opportunity and cause, unless we are to regard the framers of the act as guilty of tautology, and the Commentators have not helped us to do it but have rather hindered by their suggestion

(a) Stout, Anal. Psychology, Vol. I, p. 275.

(b) Ameer Ali and Woodroffe, *op cit.*, p. 61.

that they are all aspects of one thing. If an aspect is simply a way of looking at things, as we take it to be, a subjective matter, it strikes us as a particularly bad description of phenomena so objective in character as 'opportunity' and 'occasion'; but in any case, an aspect of a thing must be the whole thing but looked at in a particular way, it is not merely part of it. But the occasion and opportunity, never are the whole cause, they are merely parts of it, and we must now explain what we mean by speaking of parts of a cause, for it is thus that we shall find the distinction that we are seeking. The whole cause consists really of a sum of conditions all of which, as already explained, we cannot know: among these are some that strike us as contributing little to the effect and these we call the 'occasion,' 'opportunity,' 'condition' and the like, but we reserve the name of 'cause' for that condition which appears to be the most prominent and determining antecedent. Thus Prof. Sully says "a condition is any circumstance necessary to the production of a phenomenon. All the conditions of a phenomenon taken together constitute its cause. To condition is thus to have a part in causing or producing a result." (a) It is true that a cause may sometimes be called the occasion, in what sense is explained by Mr. Bradley. "Of course, even on these hypotheses, one link of a series will be a cause of what follows, if you take that link in connection with the rest of the universe. Hence with regard to 'occasionalism' we may say that since every cause must be limited more or less artificially, every cause, therefore, is able to be called an 'occasion.' You may ~~make~~ take in further and further conditions until your partial cause seems an item unimportant, and even, therefore, ineffective. And here we are on the confines of absolute error. If the 'occasion' is divided from the whole entire cause, and so held to be without an influence on the effect that is at once quite indefensible." (b)

(a) Sully, *Outlines of Psychology*,
p. 5, note.

(b) Bradley, *Appearance and Reality*,
p. 326, note 1.

But just as in the case of 'condition' which cannot be taken to be equivalent to the condition *sine qua non* as Mr. Hobhouse insists, *i.e.*, the antecedent without which the consequent cannot be, so also with 'occasion' and 'opportunity': they cannot be regarded as anything more than factors in the total result, and neither of them can be taken to be the most important one.(a)

7. It is provided in s. 27 of the Indian Evidence Act that

“when any fact is discovered in consequence of information received from a person accused of any offence in the custody of a Police-officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

One would have thought that this section was sufficiently clearly worded to be intelligible enough to the ordinary man but unnecessary recourse to irrelevant precedents combined with a failure to understand clearly what causality is on the part of our judges, has led to the importation of a vast amount of confusion and error into the criminal law.(b)

In the first place it is said “In regard to the extent of the words ‘thereby discovered’ we may derive some assistance from the test applied by the Courts in dealing with proximate and remote causes of damage, namely, whether what followed was the natural and reasonable result of the defendant’s act.”(c) As we shall have occasion shortly to examine fully the notions of ‘proximate’ and ‘remote’ causes, we will here merely refer the reader to what has been already said on temporal and spatial relations in causation, and remind him of our conclusion that ‘cause’ as it should be understood does not imply that the events in question must necessarily have proximity in time or space: as regards the citing of the doctrine of ‘natural and probable consequences,’ which seems to us to be purely gratuitous, we

(a) Hobhouse, *Theory of Knowledge*, p. 349. *cit.*, pp. 220-224.

(c) *Q.-E. v. Nana*, I. L. R., 14 Bom., 260, 267 (1889), per Jardine, J.

(b) See Ameer Ali and Woodroffe, *op*

have so many objections to this that we must similarly defer the statement of them until later on in this chapter. We cannot, however, refrain from remarking here, that though the doctrine is intelligible to us when used for the purpose of deciding whether a man should be held civilly liable for certain consequences flowing from his act, we cannot see how it can in any way be employed as a test for determining whether as a matter of fact such a consequent did follow from such an antecedent.

The same paragraph proceeds as follows :—“ It was formerly held by the Bombay and Allahabad High Courts^(a) that where an article said to be connected with an offence was produced by the party himself after giving information in respect of it, the article could not be said to have been discovered ‘in consequence of the information.’ It was said that in such a case the article is discovered by the *act of the party* (the italics are not ours but the Editors’) and not in consequence of the information.” We have said above that in ordinary life we choose out the most important and striking antecedent from among the totality of conditions and term it the cause, but we have never heard before of choosing out the most unimportant condition and ticketing it as the cause for the express purpose of excluding what was the more determining factor in the case : this, however, is clearly what was done by these learned judges. We can only account for such perversity by supposing that here again we have an instance of the view that that phenomenon can only be regarded as the cause which is immediately adjacent in time to the event to be accounted for. The reader perhaps will not be surprised to hear that the decision was subsequently dissented from in the case of *Q.-E. v. Nana* already referred to, as well as by the Calcutta High Court,^(b) but the reasons given for such dissent still betray an adherence to the same fallacy : “ It was held that the statement of the accused that he had buried the property in the fields was admissible

(a) *Empress of India v. Pancham*, I. L. R., 4 All., 189, 204 (1882); *Q.-E. v. Babu Lall*, I. L. R., 6 All., 509, 544

(1884), per Straight, J.; *Q.-E. v. Kama-lia*, I. L. R., 10 Bom., 595, 597 (1886).

(b) I. L. R., 25 Cal., 413 (1897).

under this section, as it set the *police in motion* and led to the discovery of the property, and that a statement is equally admissible whether it is made in such detail as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed." It was thus only by the vulgar expedient of positing a *latens processus*, as Mr. Hobhouse called it, in the shape of a 'setting the police in motion,' &c., that the court could satisfy itself that there really was a causal connection between the information and the discovery.

We next find it laid down by the Commentators with reference to the question 'how much of such information must be proved,' that "the discovery proves not that the whole, but some portion of the information given is true, namely, so much of the information as *led directly and immediately to*, or was *the proximate cause of*, the discovery :"(a) this is interesting because it appears that the two phrases italicised by the Editors are regarded by them as identical in meaning, a point which will be referred to again hereafter. At all events, if it is not so, an explanation of the difference might have been expected, and similarly with regard to the expressions 'directly' and 'immediately'. This view is enforced by a quotation of the words of West, J. : "It is not all statements connected with the production or finding of property which are admissible ; those only which lead *immediately* to the discovery of property, and so far as they do lead to such discovery are properly admissible . . . other statements connected with the one thus made evidence, and so *mediately*, but not necessarily or directly, connected with the fact discovered are not to be admitted, &c."(b) Similar stress is laid on the 'proximacy' and 'immediacy' of the cause by the Madras High Court(c) and this we understand from their text is the view adopted and espoused by the Editors.

(a) Ameer Ali & Woodroffe, *op cit.*,
p. 222.

H. C. R., 242, 244, 245 (1874).

(c) I. L. R., 12 Mad., 153 (1888).

(b) *Reg. v. Jora Hasji*, 11 Bom.

Now why all these persons should follow one another in reading the words 'proximate' and 'immediate' into s. 27 of the Act where there is nothing corresponding to them, we cannot for the life of us imagine; and it is the more astonishing because s. 7, which is the section that explicitly treats of causation, appears to say just the opposite, the words there being "Facts which are the occasion, cause or effect, immediate *or otherwise*, of relevant facts &c., . . . are relevant." That they should thus go out of their way to make one section of the act inconsistent in principle with another can only be attributed to confusion on the subject of Causality. It may be noted, however, that this unwarranted restriction of s. 27 was not always made, for, to quote the words of the Commentators, "the relevancy of mediate connection appears to be the *ratio decidendi* of the case of the *Queen v. Pagaree Shaha*, 19 W. R. Cr., 51 (1873) in which a wider construction was put on the words 'as relates distinctly', so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact, but also the portion which leads *mediately* by way of explanation" though they go on to triumphantly assert that this decision was overruled by *Adu Shikdur v. Q.-E.(a)* The notion that 'mediateness' is fatal to 'distinct relation' or 'consequence' is indeed whimsical to those who hold that all inference involves a middle turn, at all events on analysis, if it be not always consciously used.

8. It is time now to take up the promised examination of the doctrines of 'proximate' and 'immediate cause, and of 'necessary and probable consequences.' They are closely related and the best statement of them is probably that of Sir Frederick Pollock. "Liability must be founded on an act which is the 'immediate cause' of harm or of injury to a right. Again there may have been an undoubted wrong, but it may be doubted how much of the harm that ensues is related to the

'Proximate' 'Immediate' cause and 'necessary and probable consequences' 'Remoteness.'

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 222, note 3.

wrongful act as its 'immediate cause,' and therefore is to be counted in estimating the wrongdoer's liability. The distinction of proximate from remote consequences is needful first to ascertain whether there is any liability at all, and then, if it is established that wrong has been committed, to settle the footing on which compensation for the wrong is to be awarded."(*a*) And again, 'the meaning of the term 'immediate cause' is not capable of perfect or general definition. Even if it had an ascertainable logical meaning, which is more than doubtful, it would not follow that the legal meaning is the same. In fact, our maxim only points out that some consequences are held too remote to be counted. What is the test of remoteness we still have to enquire. The view which I shall endeavour to justify is that, for the purposes of civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate' or, to anticipate a little, 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether or not the consequence was 'immediate' does not matter. That which a man actually foresees is to him, at all events, natural and probable.'*(b)*

Supplementary to this is the maxim that "a man is presumed to intend the natural consequences of his acts," or, in the terms of a judicial statement "a party must be considered, in point of law, to intend that which is the necessary and natural consequence of that which he does."*(c)*

The above is a fair description of the doctrine and it will conduce to clearness if we examine it in parts 'beginning with the

(*a*) Pollock on Torts, 6th Edition,
p. 29 ; *cf.* also Best on Evidence, § 38.

(*b*) *Ibid.*, pp. 30-31.

(*c*) *Ibid.*, p. 33.

conception 'proximate' and 'immediate' cause. In the place first it is not hopeful when we are told that the 'immediate cause' cannot be defined: we should rather have expected otherwise, for 'immediate' is a term which has reference purely to the temporal relation, and likewise the expression 'proximate' seems capable of adequate definition in mere terms of time and space. Or to put it otherwise, it would not have been surprising if we had been simply told that they were ultimate terms that needed no definition, but carried their meaning on their face. Reverting to our description of 'cause' as that condition out of the sum of conditions which we pick out as the most important one we do not see why Sir F. Pollock should not select that antecedent condition which is most contiguous in time to the consequent, and say that that under all circumstances should be regarded as the 'immediate cause,' and likewise that condition which is most contiguous in both time and space should be regarded as the 'proximate cause.' So far as we can see this would have given to each phrase a clear meaning: at the same time it is plain that it would not have suited the doctrine in question which requires 'immediate' to be sometimes equivalent to 'natural and probable.' "There is a point where subsequent events are, according to common understanding, the consequence not of the first wrongful act, but of something else that has happened in the meanwhile, though but for the first act, the event might or could not have been what it was. But that point cannot be defined by science or philosophy; and even if it could, the definition would not be of much use for the guidance of juries." (a) Likewise Quain, J., is quoted (*Sneesby v. L. & Y. Railway Co.* (1874), L. R. 9 Q. B., p. 268). "In tort the defendant is liable for all the consequences of his illegal act, where they are not so remote as to have no direct connection with the act, as by the lapse of time for instance."

(a) Pollock on Torts, 6th Edition, p. 35 and note (x).

Now we are tempted to say to both these champions, you must make up your minds whether you will hold, as we do, that cause and effect are not necessarily contiguous in time and space, *i.e.*, as ‘cause’ is ordinarily used by the plain man, or whether you will maintain the contrary, but there is no room for hedging. If you take our view you must throw over your terms ‘immediate,’ and ‘proximate’ and indeed you must in any case, if you wish to be consistent, for at present you are trying to force into them two contradictory conceptions, that is to say, if you attach any meaning to the words ‘immediate’ and ‘proximate’ which an Englishman can understand.

That there was some difficulty about the application of these phrases is clear from the suggestion of Brett, ‘Real, decisive’
Cause. M. R., that he would prefer ‘real’ to ‘proximate,’ and the statement of Fry, L. J., “I will not attempt to give any paraphrase of the word ‘proximate’. The doctrine of causation involves much difficulty in philosophy as in law; and I do not feel sure that the term ‘real’ is any more free from difficulty than the term ‘proximate.’”(a) In another case ‘proximate cause’ was said to mean ‘direct and immediate’ cause, (b) an identification already noted by us. ‘Real,’ however, has this advantage over ‘proximate’ that it does not raise the time difficulty, and the same may be said for ‘decisive’ which Sir F. Pollock favours, though not it seems to the entire exclusion of the notion of proximity. “This leaves no doubt,” he says, “that the true ground of contributory negligence being a bar to recovery is that it is the proximate cause of the mischief: and negligence on the plaintiff’s part which is only part of the inducing causes, will not disable him. I say ‘the proximate cause’ considering the term as now established by usage and authority. But I would still suggest, as I did in the first edition, that

(a) *Seton Laing & Co. v. Lafone*, L. R., 19 Q. B. D., 68, 71, 74.

(b) *Coventry v. Great Eastern Ry. Co.*, 11 Q. B. D., 776, 780.

'decisive' might convey the meaning more exactly. For if the defendant's original negligence was so far remote from the plaintiff's damage as not to be part at least of its 'proximate cause' within the more general meaning of the term, the plaintiff would not have any case at all, and the question of contributory negligence could not arise. We shall immediately see, moreover, that independent negligent acts of A and B may both be proximate in respect of harm suffered by Z, though either of them if committed by Z himself, would have prevented him from having any remedy for the other. Thus it appears that the term 'proximate' is not used in precisely the same sense in fixing a negligent defendant's liability and a negligent plaintiff's. The plaintiff's negligence, if it is to disable him, has to be somehow more proximate than the defendant's. It seems dangerously ambiguous to use 'proximate' in a special emphatic sense without further or otherwise marking the difference. If we said 'decisive' we should at any rate avoid this danger." (a) We have not quoted this passage because we think it lucid: in fact we are somewhat mystified by phrases such as 'part of the inducing causes,' "part at least of its 'proximate cause' within the more general meaning of that term," "both be proximate," "somehow more proximate," but because we think it amounts very much to a confession of the break down of this part of the doctrine, or if it is not, that it will hardly survive such a mixing of terms.

9. We have now to consider the second part of the doctrine, that is to say, the theory of 'natural and probable consequences.' If the reader will refer back a few pages he will see that these are such as 'a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to see as likely to follow upon such conduct.' Another passage may here be cited: "For although we do not care whether the man intended the particular consequence or not, we

(a) Pollock on Torts, pp. 446-7.

have in mind such consequences as he might have intended, or, without exactly intending them, contemplated as possible ; so that it would not be absurd to infer as a fact that he either did mean them to ensue, or recklessly put aside the risk of some such consequences ensuing. This is the limit introduced by such terms as 'natural,' or more fully 'natural and probable' consequences. What is natural and probable in this sense is commonly, but not always, obvious. There are consequences which no man could, with common sense and observation, help foreseeing. There are others which no human prudence could have foreseen. Between these extremes is a middle region of various probabilities divided by an ideal boundary which will be differently fixed by different opinions ; and as we approach this boundary the difficulties increase." (a) The concluding passage may be carefully noted as it supports the view for which we have elsewhere contended that the test proposed is an impossible one. We shall now refer the reader to our chapter on the 'Theory of the Normal Man' in which will be found the reasons adduced for the following conclusions : that the person of average competence and knowledge has no existence, and such a notion is impossible of application to particular cases ; in fact this sham standard is merely ignored and the juryman puts himself in the place of it ; finally, if it could be applied, it would have to be so frequently varied and altered that the claim to have in it a universal and general rule would be a mere farce.

All that we have to say in addition here is that it is a one-sided arrangement if it is open to one side to prove that the doer actually did foresee, &c., thereby discarding, when it suits him, the standard of the man of average competence and knowledge, while it is not open to the wrong-doer to show that he is not a person of average competence and therefore such and such consequences were not intended by him or probable to him : he must in every case abide by that standard. (b) And again 'proximate'

(a) Pollock on Torts, pp. 34-35.

(b) *Ibid.*, pp. 31, 35.

and 'immediate' consequences (which are held to be the same as 'natural and probable') express objective relations among external phenomena in the sense in which these words are elsewhere used by these writers and it is difficult, therefore, to grasp how they can be said to depend on any individual's point of view, much less that of a standard man who has no personal existence.

We will conclude this section by briefly examining some of the cases given by Sir F. Pollock as illustrations of the rule of 'natural and probable consequences:' as it would occupy too much space to summarise the facts of each case here the reader must refer for details to the treatise in question.(a)

The first case is that of *Vandenburgh v. Truax*, and what (as we understand the summary) the defendant was held liable for was the loss of certain wine. To say that this was a natural and probable consequence of his action strikes us as simply fiction, and the learned author does not go further than to assert that it was natural that the tenant should 'do some damage' to the plaintiff's property. It seems to us that the decision was really capricious, the defendant being made responsible for all that followed his first act, merely because he was the original wrong-doer without any reference to whether the consequences were natural and probable or not.

The same applies to the second case of *Guille v. Swan* and to judge from the remarks concerning them in the treatise, (b) the defendant in each case was held liable (1) because he was a wrong-doer and (2) because his original act was a voluntary one, *i.e.*, so far as any principle was followed. That this is so, seems further shown by the fact that if the next case, that of *Glover v. L. & S. W. R. Co.* be compared with the first case, there can be little doubt we should imagine that the consequences in question were at least as probable as in the case of *Vandenburgh v. Truax*, yet nevertheless, it was decided in the defendant's favour. Equally

(a) Pollock on Torts. pp. 36, *et seq.*

(b) *Ibid.*, p. 38.

may this be said of the case of *Cox v. Burbidge* as compared with the first case, and of *Lee v. Riley*(a) when compared with *Cox v. Burbidge* ; for to say that it is not a probable result that if a horse strays into a road it will kick a man, while it is probable that if it strays into a field it will kick another horse, is very much like the distinction between a lottery and a raffle.

In the case of *Hill v. New River Company*(b) what was held to be the 'proximate cause' was clearly not the condition that was nearest in point of time or space, though it might have rightly been termed the 'decisive cause' or the fact that was primarily responsible for the accident.

The case of *Clark v. Chambers*(c) strongly suggests that the rule of probable consequences was never considered at all, but what decided the matter was the active wrong-doing of the defendant. This is admitted by Sir F. Pollock, though he also makes, as it seems to us, a quite unsuccessful attempt to reconcile the decision with the doctrine.

Finally the decision in *Victorian Railways Commissioner v. Coultas*(d) is clearly inconsistent with the rule, for there was nothing whatever improbable in the injuries resulting to the woman from mere fear, under the circumstances of the case. That the consequences were decided to be too remote must, as we think, have been due to other grounds : nor does it seem to us practicable to make the consequences depend on the standard of a person of ordinary courage and temper ; it is certainly not improbable that the person run over would be of less than the average courage, and why in that case should his claim to compensation rest on a mere law of averages ?

10. The treatment of Homicide by Sir J. F. Stephen in articles 219-221 of his Digest of Criminal Law appears to afford an illustration of the confusion which results from an unsatisfactory view of causation. He starts in article 219

Examination of
Sir J. F. Stephen's
treatment of Causa-
tion with reference
to homicide.

(a) Pollock on Torts, p. 44.

(b) *Ibid.*, p. 41.

(c) *Ibid.*, pp. 47-49.

(d) *Ibid.*, pp. 50-51.

with an explanation of the Causal connection which is of a contradictory character and which he is unable to adhere to : indeed the next article not merely abandons it but flatly contradicts it, although an attempt is made to save appearances by asserting that the definition in article 219 is subject to the provisions contained in the next two articles. Further, he does not always, as it seems to us, in fact apply the tests of causation which he professes to have adopted, and the conclusions are in more than one instance at variance with what we conceive the views of the plain man would be on the subject.

Homicide is the killing of a human being, and killing is defined in article 219 as follows :—“ Killing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case.

(Submitted.) But the conduct of one person is not deemed for the purposes of this article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

This article is subject to the provisions contained in the next two articles.

Illustrations.

| | | | | | | |
|-----|---|---|---|---|---|---|
| (1) | * | * | * | * | * | * |
| (2) | * | * | * | * | * | * |

(3) A, an iron-founder, ordered to melt down a saluting cannon which had burst, repairs it with lead in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A has killed B.

(4) A, B and C, road-trustees under an Act of Parliament and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract,

whereby the road gets out of repair, and D passing along it is killed. A, B and C have not killed D.

- (5) * * * * *
- (6) A tells B facts about C in the hope that the knowledge of those facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this article."

We call this suggested criterion of Causation self-contradictory because it requires that the act should be directly and immediately connected with the death, and then goes on to speak of degrees of directness and immediacy: if however these terms are to retain any distinctive meaning, and are not to become equivalent to such notions as 'natural and probable' as they do in the way they are used, *e.g.*, by Sir Frederick Pollock^(a) you must employ them with reference to what is strictly adjacent in time and space. The fact is, as we have pointed out, that immediate sequence in time cannot be made the test of Cause and Effect, and we have before us only another instance of the break-down of such an attempt, as will soon become abundantly plain.

If illustrations (3) and (4) quoted above are compared, the ground we suppose on which it is held that homicide was committed in one case but not in the other, is merely that the interval between antecedent and consequent was considered to be greater in the latter case than in the former one. This is an example of making it a question of degree dependent upon the circumstances of each particular case: but if you eliminate from illustration (3) whatever is attempted to be implied by the use of the word 'dangerous,' it seems to us that the cases are precisely on the same level and should not have been distinguished, and we believe that this would be the view of the ordinary man.

(a) See p. 202, *et seq.*, *supra*.

Pray tell us what is such a being. Is it a normal man.

If the importation of 'dangerous' into the case is intended to make any difference to the illustration, then clearly some other test of causation is being tacitly introduced, the nature of which is not evident.

The second part of the article is necessitated by the tendency to confuse the notions of Final and Efficient Cause previously alluded to. The difference between 'motive' and 'cause' has been sufficiently discussed in a former chapter^(a) where it is pointed out that you cannot preserve a clear meaning for the causal conception if you include 'motive' under it. This is to some extent recognised here, for the words "and not so as to make the first person an accessory before the fact to the act of the other" really introduce the idea of efficient cause: the man becomes an accessory before the fact, it would seem, only if he does something to encourage the commission of the crime actively (See Article 39), and this notion of 'activity' is what is implied in Efficient Cause, and carries with it the idea of force, power, &c. When, however, we come to the illustrations designed to show the point at which it can be said that the man has caused the death or not by his advice, &c., it amounts simply to this, that unless he says to B in actual words 'murder C' or the equivalent of this, he has not caused the death of C. This we think is a fair deduction from illustration (6) quoted above, and the instances taken from Othello and Oliver Twist given in the note (b), but it can hardly be said to be a successful definition of cause which makes it practically depend on the verbal formula used. The effect of words which are not an express direction may be just as certain and as certainly traced sometimes as the result of a positive command to commit homicide: the plain man sees no difference between such cases and classes them both as the cause, or refuses to call either the cause of death, because he is not hampered by the idea of directness and immediacy of connection and does not seek to

(a) Chapter III, para 7.

3rd Edition, Art. 219, note 7.

(b) Digest of the Criminal Law,

discover this by an examination of the actual expression employed. That notion is really borrowed from the physical world, and you cannot successfully employ it outside the physical act from which the death results ; it is a mistake on the part of our lawyers to try and include under it the result of one individual's words on another as though you were dealing with two mere mechanical forces that act and re-act on one another by impact.

That the legal conception of cause adopted is inadequate to do its work becomes apparent when we come to Article 220. It is here laid down that a man commits homicide, although his act is not the immediate or not the sole cause of death, in five cases, to one of which attention will be drawn separately later. This is nothing more or less than an abandonment of the test of immediateness and the inclusion—if a thing may be said to be included in something else which it absolutely contradicts—of remoteness of connection in the legal conception of Cause : it further involves the recognition of plurality of causes which is equally contradictory of the main law, and the discussion of which we have purposely avoided in this chapter as unnecessary on the view of causation put forward by us.

We may remark that Sir J. F. Stephen's definition of Cause having once capitulated and let in five exceptions in Article 220, there seems no reason why its defeats should not extend to twenty or more in number if any one of moderate ingenuity were concerned to combat it further. We shall however confine ourselves here to noticing one of the five exceptions and its illustration : it is homicide “(c) If by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which under the circumstances would appear natural to the person injured.

Illustration.

(4) A violently beats and kicks B, his wife, on the edge of a pond. She to avoid his violence, throws herself into the pond and is drowned. A has killed B. ”

To this a note is annexed that if the intention was to escape further ill-usage by suicide, the case would be altered. But if so, A is made the cause of B's death not according to the degree of the connection between his act and the resulting death of B, nor yet even according as his own intention was to kill her or not, but according to what was B's intention in the action she took consequent on A's ill-usage. Further in order to judge of this it has to be considered whether the action which B took was one which under the circumstances would appear natural to the person injured, which is the old doctrine of natural and probable consequences against which we have elsewhere protested. It thus comes to pass that A has caused B's death or not simply "according to the point of view which happens to be taken by the external observer,"(a) and it appears to us that, if a number of educated persons were asked to say whether homicide had been committed or not in each of the two cases quoted [*i.e.*, illustration (6) to Article 219 and illustration (4) to Article 220], they would class the former one as homicide but not the latter, arriving in each case at a contrary conclusion to that of the author of the Digest.

In Article 221 we come to three cases in which a person is deemed not to have committed homicide although his conduct may have caused death :

- “(a) when the death takes place more than a year and a day after the injury causing it
- (b) (It is said) when the death is caused without any definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the body, which collectively cause death though no one of them by itself would have caused death ;

(a) See p. 188, *supra*.

- (c) (It seems) when the death is caused by false testimony given in a Court of Justice.

Illustrations.

- (1) A by a long series of acts of ill-treatment, none of which by itself would cause death, causes the death of B. A has killed B.
- (2) A and B in order to get a reward offered for the conviction of highway robbers, conspire together to bring a false accusation of highway robbery against C, whereby C is convicted and executed. A and B do not kill C.

The first case is remarkable because it implies that the effect may follow the cause after a longer interval than one year, and in view of this possibility it has to be specially laid down that such a case of causation is not homicide. If, however, the test of 'immediate and direct connection' were really worth anything and could be adhered to, it would be unnecessary to lay down anything of this kind, because such a case would be excluded by the mere terms of the definition of cause adopted in Article 219. At all events, so far as immediateness is concerned, such a case would have no chance, and if any separate claim were made for it on the score of 'directness' we might well ask the claimant how he proposes to define 'directness' without the aid of 'immediateness.'

As regards the second case it is remarked in the note accompanying it (a) that Dr. Wharton rationalizes the rule thus: "Death from nervous causes does not involve penal consequences," a conclusion which our author does not accept. He instances the cases of a man being intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him: of a sick person being intentionally awakened by a loud noise when sleep gives him a chance of life: of a man known to have an aneurism of the heart being startled by his heir rushing into the room and roaring

(a) Article 221, note 5.

in his ear 'your wife is dead,' the intention of the heir being to kill him. All these cases he considers would be murder, but as regards a prosecution for breaking the hearts of fathers or wives by bad conduct, he replies that such an event could never be proved. A long course of conduct gradually breaking a man's heart could never be the "direct or immediate" cause of death.

It appears to us that there is a tendency here to confuse the question of intention with the question of causation, and that the actual causing of death is in reality inferred from the assumed intention to cause it. In the first instance if it were not clear that the man was intentionally killed by being kept awake we doubt whether any one would say that the man who kept him awake caused his death, and likewise in the other two instances. These cases are on the same level with cases of breaking a person's heart by a long course of conduct, because the difficulty is the same in each, *viz.*, that you cannot pick out that one prominent and determining antecedent from among the sum of conditions which contributes most to the effect.(a) The effect, *viz.*, death, is not caused by the single act of waking up, shouting out, keeping awake, &c., that merely contributes something to it, and unless you import into the act an intention to kill, it does not even appear to be justifiable to regard this alone as the cause.

In the third case it is again assumed that death was caused by something that was not directly and immediately connected with it, *viz.*, the false testimony. So far therefore as causation goes you may have it without directness and immediateness of connection: why then is this not a case of homicide? For ourselves we really cannot say, and we think that the plain man would certainly regard it as such. If it be argued that the intention of A and B was merely to get a reward and not to bring about C's death then we should like to ask why the same test should not be used in the case of the husband who beat his wife in consequence

(a) See p. 197, *supra*.

of which she threw herself into the pond [see illustration (4) to Article 220] ? It is not suggested there that he had any intention to kill her, and surely it was at least as probable that the death of C would result from a false charge involving a capital penalty, as it was that the death of B by drowning would follow on the violent beating given by A, and the connection is not really more direct in the latter than in the former case.

The fact is that by sometimes regarding cause and effect as requiring immediate connection, and sometimes allowing remote connection, and sometimes looking also to the intention of the agent in the case when deciding the mere question of causation, our author plays fast and loose with Causality, and so we get results that contradict one another and offend the plain man's sense of what is right.



CHAPTER VIII.

BELIEF, DOUBT, TESTS OF TRUTH, REALITY.

Belief described—Belief distinguished from knowledge—Proof—Belief based on Experience—The inexperienced Judge necessarily sceptical—Doubt described—Doubt and Disbelief distinguished—What is reasonable Doubt—Irrational Doubt—The ring of Truth—Belief and Feeling—Belief and Action—Belief and Desire—The intellectual element in Belief—Imagination and Belief—Truth — Impossibility — Probability — Frequency—Reasonable Doubt again considered—Demonstration and Proof distinguished—European and Native Evidence—Criticism of Sir James Stephen's views on Truth, Belief and Reasonable Doubt.

BELIEF, it would seem, cannot be defined. "It may be described," writes the late Professor Adamson, "or marked off from similar or contrasted states, but a rigidly scientific definition of what appears to be a simple ultimate fact is not attainable." (a) In popular language, he says, it is taken to mean the acceptance of something as true which is not known to be true, the mental attitude being a conviction that this is not so strong as certainty, but stronger than mere opinion; the ground of such conviction is probable as opposed to intuitive or demonstrative evidence.

He distinguishes Belief from Knowledge as follows :—We know states of consciousness when they are immediately present, together with their differences, similarities, connections and relations to self, also what is necessarily connected with present experience and can be logically deduced from it, and all

(a) R. Adamson, Art. Belief, Encycl. Brit., 9th Edn., Vol. III, p. 532.

propositions of apodeictic certainty such as those of mathematics and logic. The field of belief is sensible cognition, memory, testimony, *i.e.*, we accept as true facts not in our own experience and expectation. Many objects of belief are also objects of knowledge, but not all; and he expresses the subjective side of belief by saying that, belief is the thinking of reality which is determined by grounds not necessarily valid for all intelligence, but satisfactory for the individual thinker. (a)

The above, it is believed, is an accurate account of the popular conception of Belief, and also in the main of the Psychological use of the term. The law apparently distinguishes two kinds of belief, both based on inference, but only treating that as a real inference which is as to matters not directly perceived by the senses. Those matters directly perceived by the senses it terms 'facts' and admits the witness's statements concerning them as evidence, not requiring him to necessarily speak with certainty about them but allowing him to say that he 'believes' or 'is of opinion' that he saw A, &c.; but 'belief' in the other sense of inference from what is not directly perceived may not be stated in evidence except in a few cases which are mostly included under the head of 'opinion of experts.' (b)

This distinction between matter of fact and matter of opinion will be found treated of elsewhere under the head of 'inference.'

2. It will be well perhaps to start by ascertaining what is meant by 'proof' in law. The following

Proof.

is the definition given in s. 3 of the Indian Evidence Act:—"A fact is said to be proved, when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act

(a) R. Adamson, Art. Belief, Encycl. Brit., 9th Edn. Vol. III, p. 533.

Encycl. Brit., 9th Edn., Vol. VIII, p. 741.

(b) E. Robertson, Art. Evidence,

upon the supposition that it exists." Proof then is concerned with Belief and also with what is probable.

"The word proof," says Best, "seems properly to mean anything which serves, either immediately or mediately, to convince the mind of the truth or falsehood of a fact or proposition ; and as truths differ, the proofs adapted to them differ also..... 'Proof' is also applied to the conviction generated in the mind by proof properly so called,"(a) and with respect to conviction he says "the persuasion of guilt ought to amount to a moral certainty" "such a moral certainty as convinces the mind of the tribunal, as reasonable men, beyond all reasonable doubt."(b) This will be sufficient for the present, and we shall now proceed to show what it is that creates belief or conviction and in what doubt consists, and further what is the nature of probability.

"It is commonly admitted that the great source of all definite
Experience, Belief,
and Reality. connective belief is experience and association. Reality is given us in our common-sense-experience as a tissue of connected parts, *e.g.*, qualities conjoined in things, a succession of connected changes in things. These connections in our presentative experience determine by the process of association the order of our representations. We may say then that all belief tends to take on the form of an apprehension of an objective connection or relation, which relation is suggested by a process of reproduction. As pointed out above the process of contiguous association is that by which the order of our ideas is assimilated to that of our perceptual experience. Hence contiguity is the main intellectual factor in belief. To realize an idea by setting it in definite relations of space and time is only possible through the workings of contiguous associations."(c)

We believe then what we can connect with and what fits in with our own experience, and as the strength of association varies

(a) Best on Evidence, § 10

(b) *Ibid.*, § 95.

(c) Sully, Outlines of Psychology,
p. 302.

with the amount of repetition and with the degree of uniformity of the connection, recurring and invariable conjunctions produce stable thought connections. The point that we wish to emphasize is that we must seek the criterion of Reality within and not without our consciousness. "It can be nothing else," says Höffding, "than the inner harmony and consistency of all thoughts and experiences.....it is only the single and immediate phenomena of our own consciousness of which we have a direct and immediate certainty. As soon as we have to do with complex phenomena, the only possible criterion of Reality is in the firm causal connection." (a)

We desire to illustrate further in what sense we mean that Belief depends on ourselves and not on the objective character of facts outside us, and this seems to be well done by Dr. J. Ward in the following words:—"Emotion and desire are frequent indirect *causes* of subjective certainty, in so far as they determine the constituents and the grouping of the field of consciousness at the moment—'pack the jury' or 'suborn the witnesses' as it were. But the *ground* of certainty is in all cases some quality or some relation of these presentations *inter se*. In a sense therefore the ground of all certainty is objective—in the sense that is of being something at least directly and immediately determined for the subject and not by it. But though objective this ground is not itself—at least is not ultimately—an object of presentation.....it depends upon the effect of the proposition on the subject judging," and then he continues later "the consistency we find it possible to establish among certain of our ideas becomes an ideal, to which we expect to find all our experience conform." (b) And again, "the reality of a presentation turns not upon what these elements are regarded as qualities or relations presented or represented, but upon whatever it is that distinguishes the presentation from the representation of any given qualities or relations. Now this turns partly upon the

(a) Höffding, *Outlines of Psychology*, (b) J. Ward, *Art, Psychology Encycl.*
p. 219. Brit., 9th Edn., Vol. XX, p. 83.

relation of such complex presentation to the subject whose presentation it is Reality or Actuality is not strictly an item by itself, but a characteristic of all the items that follow, *i.e.*, impenetrability, unity and complexity, temporal continuity, substantiality.”(a) (What is to us real, true, probable, &c., and therefore that in which we believe is in the last resort what accords with our experience, and this no doubt is what Mr. Bradley implies when he asserts consistency to be the standard of reality and experience to be the same as Reality (b), and says that the real is what satisfies.(c)

This will become still clearer when we analyse doubt : at present it must be pointed out as the result of this view that it is now apparent why different Magistrates and Judges hold such conflicting opinions as to the truth of evidence. We believe that to be true which accords with our experience, and the Barrister Judge, *e.g.*, who comes out from England and has had no experience of the people, of whose language and thoughts he is altogether ignorant, has no experience with which the evidence he reads or takes can possibly accord. If he applies his experience of the European at home, as he may try to do, he finds that little accords with it and is disposed to reject as untrue or improbable almost everything that comes before him, while if, on the other hand, recognising the danger of such a course, he attempts to do entirely without the aid of experience as the test of reality, he must necessarily have recourse to the rules and maxims of legal text books, by a too close adherence to which he rapidly becomes simply the exponent of the letter of the law to the disregard of the more important facts. It is not surprising therefore if he acquires the reputation of being both sceptical and a lover of technicalities.

But further than this, a man placed in so false a position must naturally be timid, and to be suspicious is part of the general

(a) *Ibid.*, pp. 55-56.

Reality, pp. 139, 144.

(b) F. H. Bradley, Appearance and

(c) Mind N. S. 49, p. 57, Note 1.

temper of timidity : this therefore also contributes to the same result. For suspicion expresses the influence of fear on belief, it is a state in which trifling incidents are read as the certain index of great matters and more especially it points to exaggerated estimates of the motives and intentions of others.(a)

We are aware that it is claimed for this type of judge that his greater legal training enables him to weigh evidence more successfully than the judge who has spent more of his time among the people and less in the law Courts, but such a claim is merely due to ignorance of what weighing evidence means. "If one point of similarity or difference," says Mr. Hobhouse, with reference to a remark that points of resemblance must not be counted but weighed, "is taken as intrinsically of greater weight than another, this can only be on some ground of experience of its behaviour,"(b) and so also when evidence is weighed the reason why more importance is attached to one witness's statement than another's is that the experience of the judge leads him to hold that it is more likely to be true. It is by experience that you weigh testimony not by the rules of writers on evidence and therefore the man who has the greater experience—by which we mean experience of the people, not of the law Courts—will have the advantage here.

It is the experience of human nature not of books that enables us to judge, as the late Professor Tyndall says when speaking of Mr. Mozeley's defence of miracles : "He accepts these miracles on testimony, why does he believe that testimony ? How does he know that it is not delusion : how is he sure that it is not even fraud ? He will answer that the writing bears the marks of sobriety and truth ; and that in many cases the bearers of this message to mankind sealed it with their blood. Granted with all my heart ; but whence the value of all this ? Is it not solely derived from the fact that men, *as we know them*, do not sacrifice their

(a) Bain, Mental and Moral Science, p. 236.

(b) L. T. Hobhouse, Theory of Knowledge, p. 295.

lives in the attestation of that which they know to be untrue ? Does not the entire value of the testimony of the Apostles depend ultimately upon our experience of human nature ?”(a)

Indeed we may quote from a well-known legal writer to the effect that the experience of the law Courts is not the experience which is most favourable to the discovery of whether the witnesses are speaking the truth or not, but rather the experience which is gained outside them : “ The natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a judge’s qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required ; but it is only in exceptional cases that questions arise which present any legal difficulty, or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This pre-eminently important power for a judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a judge is by no means peculiarly favourable. People come before him with their cases ready prepared and give the evidence which they have determined to give. *Unless he knows them in their unrestrained and familiar moments, he will have great difficulty in finding any good reason for believing one man rather than another.* The rules of evidence may provide tests, the value of which has been proved by long experience, by which judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections ; but they do not profess to enable the judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular fact. The correctness with which this is done must depend upon the natural sagacity, the logical power, and the practical experience

(a) J. Tyndall, on Miracles and Special Providences, R.P.A. Edn., p. 105.

of the judge, not upon his acquaintance with the law of evidence.”(a)

3. The following is Professor Stout’s description of the mental state in Doubt: “Whenever there is any kind of felt inconsistency, there is a psychical conflict. It arises whenever a conscious process tends to take a plurality of incompatible directions. We may adduce as a typical instance of conflict in one of its highest phases the mental attitude of a man who in pursuing a journey on foot, comes to cross-roads and cannot decide which is the right one to take. This is a case of conflict involved in mere doubt or suspense; that involved in logical contradiction may be illustrated by the mental attitude of a person who hears from two equally credible witnesses opposite statements concerning the same fact.”(b)

The essence of doubt is that the mind can take two lines: “in the case of complete doubt” says the same writer, “it is equally easy to frame the thought A B and its opposing alternative A C. In the ideal case of complete assurance it is impossible to frame the thought A B; so that we are absolutely constrained to think A C. Between complete doubt and complete assurance there are all means of gradation proportioned to the difficulty of mentally substituting A C for A B.”(c) Doubt then is not a quality relating to ideas or things, but a feeling, a state of the mind itself, and to speak of anything as doubtful in itself is incorrect. It is only when there is an alternation of ideas that doubt arises: thus Professor Wundt says “the statement that doubt is the compound of the feelings of acquiescence and repugnance is certainly a true description of the alternating affective states which go to constitute the entire mental process. But there seems to be present in addition a resultant total feeling directly corresponding to the dissension in the emotional condition. There may be moments of doubt when neither the feeling of acquiescence nor the feeling

(a) Stephen, Introduction to the Indian Evidence Act, Edn., 1872, pp. 41-42.

(b) Stout, Analytical Psychology, Vol. I, pp. 281-2.

(c) *Ibid.*, Vol. II, p. 241.

of repugnance is in consciousness at all ; and these moments possess a unique affective character which does not appear to be analysable into either of the other two feelings which displace it from time to time : but it may continue to exist alongside of them. At such moments therefore there exist three feelings, those of acquiescence and repugnance and the total feelings resulting from the two, but qualitatively different from them." (a) And again "in doubt and in dissonance the resulting feeling is determined to a far greater extent by the characteristic alternation of ideas than by the nature of the ideas themselves. The total feelings in particular are always essentially dependent on some peculiarity of the alternation and succession of ideas." (b)

Such being the nature of doubt it is necessarily a state of uncertainty, and it, and not disbelief, is the proper psychological opposite of Belief. Disbelief indeed is a totally different mental state and in fact resembles Belief. 'We never disbelieve anything except for the reason that we believe something else which contradicts the first thing.' (c) 'Belief and Disbelief are but two aspects of one psychic state, the real psychological opposites of belief are doubt and enquiry.' "The whole distinction of real and unreal, the whole psychology of Belief, Disbelief and Doubt, is thus grounded on two mental facts—*first*, that we are liable to think differently ; and *second*, that when we have done so, we can choose which way of thinking to adhere to and which to disregard. The subjects adhered to become real subjects, the attributes adhered to real attributes, the existence adhered to real existence ; whilst the subjects disregarded become imaginary subjects, the attributes disregarded erroneous attributes, and the existence disregarded an existence in no man's land." (d)

It is sometimes a difficulty with Magistrates and Judges that they cannot come to a conclusion on one side without appearing

(a) Wundt, Human & Animal Psychology, p. 219.

(b) *Ibid.*, p. 222.

(c) W. James. Principles of Psychology, Vol. II, p. 284.

(d) *Ibid.*, pp. 290-1.

to disbelieve a witness who seems to them respectable, and it is frequently argued by advocates, that, as the judge decided so and so, he disbelieved such and such a witness without giving any reasons for doing so. But the conclusion that there must have been disbelief on the judge's part is not necessarily correct for disbelief is not merely want of belief but the attributing of falsity to some assertion or fact. It has a positive basis like all negatives.(a) You may, that is, doubt without disbelieving, and in fact you must do so, for it is only when doubt is gone that you can either believe or disbelieve. What has in fact happened is that the judge has failed to make up his mind either on the whole case, if it be a criminal one, and remaining in a state of doubt has, as it is called, 'given the accused the benefit of the doubt,' or, if it be a civil case in which some decision has to be given for one side or other, he has remained in a state of doubt as to that witness's evidence and so has practically excluded it from consideration and given his verdict without reference to it on the other testimony. You may argue that such an attitude is illogical or even impossible : as to the first we have nothing to say, but as regards the second we see nothing psychologically impossible about it. It is merely a case of ceasing to attend to the idea suggested by that witness's evidence and ideas which are not attended to, as soon as they cease to be held before the mind, give place in the mental struggle for existence and fade away : afterwards when the advocate argues the case he brings this evidence specially into attention and it may then appear difficult to understand how it could have been excluded from consideration at the time, but this is because it is now held prominently before the mind. And for more on this point we must refer to the remarks on attention ; here we will conclude by quoting in support of our statement the words of Mr. Schiller "if we desire to entertain contradictory beliefs. . . we have merely to refuse to think them together. This indeed is what the great majority of men have always done." (b)

(a) F. H. Bradley, *Mind* N. S. 49, pp. 4-5.

(b) F. C. S. Schiller, *Humanism*, p. 53.

4. Now that the nature of doubt has been explained and Reasonable Doubt. in what respect it differs from disbelief we are in a position to discuss 'Reasonable Doubt' an expression used in the definition of Proof already quoted. And first will be cited some directions concerning it which have been given in law. (a) In the case of *Queen v. Castro* it was said "but the doubt to the benefit of which the accused is entitled must be such as rational thinking, sensible men may fairly and reasonably entertain : not the doubts of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. They must be doubts which men may honestly and conscientiously entertain." This is lengthy but hardly assists as it does little more than define 'reasonable' in terms of reason. Again in the case of *R. v. Manning and Wife* it is said "the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of certainty which the law requires, and which will justify you in returning a verdict of guilty." This is a favourite dictum which may be found quoted in most of the Indian legal text-books, but it appears to us to rest on a wrong basis. The gravity of the concerns has nothing to do with the matter : it is this notion which appears also in such advice as the following, "the fouler the crime is the clearer and plainer the proof of it ought to be," "the greater the crime, the stronger is the proof required for the purpose of conviction," and "on capital charges and charges of murder especially, a double degree of caution is requisite." (b) As L. C. J. Dallas said in the case of *R. v. Ings* "nothing will depend upon the comparative magnitude of the offence : for be it great or small every man is entitled to have the charge against him clearly and satisfactorily proved," and to demand more than this by way

(a) The various dicta quoted here are to be found on pp. 33-4, Ameer Ali & Woodroffe's 2nd Edn. of the Indian

Evidence Act unless otherwise stated.

(b) Best on Evidence, § 553.

of proof is plainly to go beyond reason, as it seems to us Sir Elijah Impey did in the case of *Nuncomar* where he is reported to have said "you should be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner."

Nor, again, can we consent to Mr. Mayne's somewhat similar method of treating the subject. After quoting s. 3 of the Evidence Act concerning proof, that author remarks "It is said that the whole question turns upon this: when should a prudent man act upon the supposition that a fact exists, when he only considers its existence to be probable? This depends, as the Act says, upon the circumstances of the case. Where a man's own interests only are concerned, a prudent man may act upon very slight evidence, where the interests of others are concerned, he will probably require stronger evidence. A prudent man who is asked to take into his service a person who lies under a suspicion of theft, will probably act upon the supposition that the charge was true and refuse to employ him. If the charge is first made after the man has entered his service, he will require stronger evidence to dismiss him on account of it, and still stronger to charge him with the theft." (a) Such considerations do not make the doubt itself reasonable or otherwise, they merely influence the man's conduct with reference to the doubt: they help him to determine to what extent other interests shall prevail with him against the doubt the existence of which he acknowledges. When it is said in s. 3 of the Evidence Act that "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists," we do not understand by the words 'under the circumstances of the particular case,' considerations such as whether the man himself will alone be affected by his action or

(a) Mayne, *Criminal Law of India*, 2nd Edn., pp. 240-1.

whether others' interests will also be concerned. It is rather meant that regard must be had to what opportunities there are of evidence coming to light in each case, and where there is less likelihood, *e.g.*, of witnesses having seen the act, &c., the prudent man will act on less evidence. If this interpretation is not correct, and Mr. Mayne is right in his view, we can only regard this portion of the Act as misleading.

The truth is that doubt being a feeling or state of the mind it cannot be made to vary according to the importance or non-importance of the crime—a notion which is merely due to intellectual timidity,—nor yet according to the persons affected by it, &c., but we must seek some grounds of explanation relating to the mental state itself, the essence of which is, as we have already said, the ability of the mind to take two lines. Now belief may be destroyed either by an actual collision with facts, when it is simply rejected, or by an attempt to think otherwise and this attempt is often made simply to see how far it will succeed. Thus Professor Stout says, “So in climbing up the series of means towards an end we may test the stability of the several links by a mental effect to dissolve their connection. In proportion as the attempt proves abortive, the more we are furthered in our progress. On the other hand, the more easily we find it possible to realize in thought opposite alternatives, we become less confident and less energetic in our pursuits of the object along the special line.”(a) He then quotes Herbert Spencer’s well-known test “the inconceivability of the opposite” and accepts it as a test of belief though not of truth, on the ground that what is unthinkable at one time may not be so at another when we have further evidence.

It seems therefore that a doubt is reasonable or not according to the extent to which you can think the opposite or alternative of the proposition affirmed.

Now a caution must be added here, that this is not equivalent to saying that the doubt is reasonable or not according as

(a) Stout. *op. cit.*, Vol. II, p. 241.

you can think the prisoner innocent or not under any circumstances, but according as you can think him innocent without altering the conditions which you hold established on the evidence. This qualification must be insisted on, for people are prone to unconsciously alter the conditions and sometimes even do it consciously ; in the latter case they merely become advocates for the one side or the other, in the former they are prejudiced unknown to themselves.

“As I sit writing,” says Professor Stout, “I see a candle before me : the sight of it suggests irresistibly the present possibility of touching it by a movement of my arm, and I believe that I can so touch it. The cause of my believing that I am able to do so is that I cannot by any effort represent myself as unable *except by representing the conditions as altered.*”(a)

We believe that the jurymen who ask themselves can I really conceive the accused innocent under the circumstances shown, *i. e.*, without interpreting the facts to mean anything other than my experience tells me they naturally would mean, will soon be satisfied as to whether there is or is not a reasonable doubt as to his guilt.

Though we are averse to the introduction of the idea of prudence into the interpretation of reasonable doubt, we agree with the method adopted by Sir J. F. Stephen as leading to a conclusion which is in substantial conformity with our own, though expressed no doubt in less psychological terms. “The question,” he says, “what sort of doubt is ‘reasonable’ in criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner’s innocence. The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable.

“Though it is impossible to invent any rule by which different probabilities can be precisely valued, it is always possible to say whether or not they fulfil the conditions of what

(a) Stout, *op. cit.*, Vol. II, p. 251.

Mr. Mill describes as the Method of Difference ; and if not, how nearly they approach to fulfilling it. The principle is precisely the same in all cases however complicated or however simple, and whether the nature of the enquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses or unknown or suspected facts by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts, that one hypothesis is proved. If more than one hypothesis is consistent with the known facts, but one only is reasonably probable—that is to say, if one only is in accordance with the common course of events—that one in judicial enquiries may be said to be proved “beyond all reasonable doubt.” The word ‘reasonable’ in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed), and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence.”(a)

How this view is related to our own will appear more clearly when we come to speak of probability later on, under which head recurrence is made to the nature of reasonable doubt. We cannot however accept his further statement that the degree of probability which it is necessary to show is identical with the question “what risk of error is it wise to run, regard being had to the consequences of error in either direction?”(b) This would justify the view already objected to that the fouler the crime the plainer must be the proof, and it ignores the fact that Belief and Doubt are emotional and intellectual operations which are not at all dependent upon the consequences which will result from the course of action adopted. This conclusion is an erroneous one caused by a mistaken attempt to use the prudent man as a standard by which to measure doubt.

(a) Stephen, Introduction to the Indian Evidence Act, pp. 36-7.

(b) *Ibid.*, p. 51. For a further dis-

cussion of this author's views, see §§ 11-13 of the present chapter.

5. Our experience is that while it is considered necessary to give reasons for belief, it does not seem to be considered equally necessary to give reasons for doubt at all events in criminal cases, and even the highest Appellate Courts will reject evidence on some general ground such as that it has not the ring of truth or stamp of reality or some such catch phrase.

This attitude is often irrational and it appears to us that where one idea holds the field it ought to prevail in the absence of something positive to the contrary, and there are psychological grounds founded on the nature of doubt for holding this view. For you only doubt or reject something offered on the basis of some positive knowledge. "Even the extreme of theoretical scepticism," says Mr. Bradley, "is based on some accepted idea about truth and fact. It is because you are sure as to some main feature of truth or reality that you are compelled to doubt or reject special truths which are offered you." (a) And again "It is impossible rationally to doubt where you have but one idea doubt implies two ideas, which in their meaning and truly are two; and without these ideas, doubt has no rational existence. Where you have an idea and cannot doubt, there logically you must assert if an idea does not contradict itself, either as it is or as taken with other things it is at once true and real." (b)

There then follows a passage which we are constrained to say accurately applies to more than one judgment of an Appellate Court that we have seen, "He who wishes to doubt when he has not before him two genuine ideas, he who talks of a possible, which is not based on actual knowledge about Reality—it is he who takes his stand upon sheer incapacity. He is the man who, admitting his emptiness, then pretends to bring forth truth. And it is against this monstrous pretence, this mad presumption in the guise of modesty, that our principle protests." (c)

(a) Appearance and Reality, p. 512.

(c) *Ibid.*, pp. 514-5.

(b) *Ibid.*, p. 514.

Now what we maintain is that these doubting Judges whom we have in mind, have no positive knowledge of any description to serve as a basis of their doubts, and that they merely take advantage of their position to dogmatically assert that a thing is probable or improbable : but you will never convince anyone by this method unless you state your experience and it happens to correspond with his.

And since we have mentioned 'the ring of truth' we may here remark that while an Original Court
 The ring of truth. may legitimately speak of such a thing, it appears to us rather nonsense for an Appellate Court to do so. For 'the ring of truth' is present or absent in a narrative not so much according as it corresponds to the experience of the hearer, which is rather the question of probability, but according as the events were associated with feelings in the past, which feelings are now revived by the narrator ; and it is only the person who actually hears the narrative and sees the gestures and demeanour of the witness who can judge this. This is the reason why witnesses are often said to act their narrative,^(a) and why made-up stories sound hollow, for these cannot have been associated with any feelings in the past and therefore when they are told there are no feelings to revive. Thus it is, as Professor James explains, that we are not affected by what we are told we did when children " and partly because no representation of how the child *felt* comes up with the stories. We know what he said and did ; but no sentiment of his little body, of his emotions, of his psychic strivings as they felt to him, comes up to contribute an element of warmth and intimacy to the narrative we hear, and the main bond of union with our present self thus disappears. It is the same with certain of our dimly recollected experiences. We hardly know whether to appropriate them or disown them as fancies, or things read or heard and not lived through. Their animal heat has evaporated : the feelings that

(a) C. D. Field, *Law of Evidence*, 5th Edn., p. 50.

accompanied them are so lacking in the recall, or so different from those we now enjoy, that no judgment of identity can be decisively cast.”(a)

6. The influence of Feeling on Belief is too well-known to be disputed, and Belief itself is said to be
 Belief & Feeling. more allied to the emotions than to anything else. Here, therefore, it will simply be explained why this is so and how the influence of feeling is exercised.

In the first place we believe that of which we are certain and which seems to us real, and emotion and desire, as we have already said, are frequent indirect causes of subjective certainty. Again to be real a thing must be both interesting and important, and thus reality means relation to our emotional and active life.(b)

“Belief,” says Professor Sully, “involves an element of feeling : when we believe we are satisfied or at rest”,(c) hence, *e.g.*, the happiness of persons strongly affected by religious beliefs and their certainty of future salvation. Unfortunately however—or fortunately—the intensity with which a belief is held is no guarantee of its truth, a fact which seems to be forgotten by some who think it sufficient to express their own certainty on a point in order that it may be accepted by others. The value of such a declaration to others is simply in proportion to their opinion of the declarant’s honesty and intellectual capacity.

As regards the honesty with which a belief is held, there is
 Belief and Action. no doubt a criterion sometimes to be found in the fact that action did or did not follow it; but such criterion is not always correct, for some men frequently shape their conduct contrary to their real beliefs, either because they cannot shake off a habit or from a conviction of the inutility of prosecuting a course of action which will not be acceptable to others or likely to succeed in the present state of their surroundings. Bain considers that such cases are

(a) James, *op. cit.*, Vol. I, p. 335.

(b) *Ibid.*, Vol. II, pp. 283, 295.

(c) Sully, *Outlines of Psychology*, p. 300.

no exception to the rule that what we believe we act upon, and explains them as instances in which one motive is overpowered by a stronger one,^(a) but even if it be correct that belief, in the absence of strong counteracting influences, is always followed by action, the converse is by no means true. We often have action where there is no true belief, and in every instance in which a false charge or complaint is laid against any one, it is clear that action has been taken in the absence of a true belief in the person's guilt. In charges, *e.g.*, of rape, considerable stress is usually laid on whether an immediate complaint was made by the woman or not, and this is merely an instance of using action as a test of belief.

There is, however, another aspect of the relationship which consists in the view that the impulse to action causes belief. Thus Professor Sully says, "the occurrence of this inhibition of active impulse by doubt will further depend on certain organic conditions. In cases where the vital energies are high, and the motor system is vigorous and predisposed to activity, the active impulse will be strong and not easily checked. Not only so, belief is itself conditioned in part by the same organic factor. Where there is a powerful disposition to act, there confidence tends to be high, whereas when the vital energies are low, and as a consequence, the active impulse is weak, distrust is apt to creep in."^(b) As an illustration of this there occurs to mind the loss of confidence of the Athenian General Nikias in the Sicilian war after he had been stricken by disease. But it is not merely a matter of health: "Belief stands in a peculiarly close relation to activity." In most cases, at any rate, it involves the incipient excitation of impulses to look out for a particular result and to follow a particular line of action. Owing to this organic connection with action, belief may be influenced by strengthening the active elements. Thus we all know an eagerness to do something tends to favour

(a) Bain, *Mental and Moral Science*,
p. 372.

(b) Sully, *op. cit.*, pp. 418-9.

the belief that would justify us in doing it, *e.g.*, our power to accomplish our purpose, the rightness of the action, the worthiness of the object &c.”(a)

This suggests that when judging as to the honesty of a person's belief when he acted in a certain way, to merely reflect on how the matter would have appeared to us under the circumstances, is often not a sufficient test; we must further allow for the fact that we have no disposition to action, while he had an impulse to act which on psychological principles would have affected his belief. No doubt this requires some imagination on the judge's part, but without it we are clearly liable to be misled.

Similar is the effect of desire on belief, which cannot be

omitted from consideration in such cases if
 Belief and Desire, we are to come to a correct conclusion.

“If a certain objective combination,” says Prof. Stout, “presents itself as the only condition or the most favourable condition, of obtaining a certain end, the active tendency towards this end is of itself a tendency to believe in the objective combination.”(b)

As to the way in which Desire acts, the following is the same writer's account:—“This influence of Desire on Belief often operates by simply diverting the attention from counter evidence The mind is so absolutely pre-occupied by certain tendencies, that whatever crosses them either never comes before consciousness at all, or, if it does, is immediately dismissed It also directly intensifies the resistance offered by a mental combination to conditions which might otherwise dissolve it But the more often they (*i.e.* such beliefs) are acted upon the more completely they become incorporated with the original conation so as to become an integral part of it; hence the support they receive from it is increased.”(c)

With this may be compared the manner in which Feeling in general influences Belief: “This action of feeling on belief is in every case mediate; that is to say, it works by modifying the

(a) Sully, *op. cit.*, p. 305.

(c) *Ibid.*, pp. 255-6.

(b) Stout, *op. cit.*, Vol. II, p. 254.

processes of ideation themselves. It is by giving preternatural vividness and stability to certain members of the ideational train called up at the time, *e.g.*, ideas of occurrences which we intensely long for, or especially dread, and by determining the order of ideation to follow not that of experience but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type.” (a)

7. Feeling then acts in part by warping the intellectual element in Belief. This intellectual element depends largely on association of ideas : “the frequent experience of a succession leaves a firm association of the several steps, and the one suggests readily all the rest. This enters into belief and augments in some degree the active tendency to proceed in a certain course.” (b) The doctrine of association of ideas is explained under the head of ‘Memory’ and we have already alluded to the importance of association by contiguity in paragraph (2) of this chapter ; now, it is the principle of association by contiguity and similarity, which explains why it is that a judge is always inclined to accept as true an incident related of which he himself has had similar experience. For his past experience enables him to ‘realise the idea by setting it in definite relations of time and space,’ while the judge who has no such experience of the country and people cannot do it, and finding the idea strange to him is more likely to reject it on account of its hostility to his pre-formed associations and existing mental disposition.

On the same ground we can understand why some defences carry conviction while others, which in themselves appear to be strong, are easily rejected by the magistrate. James Mill maintained that all cases of belief are referable to indissoluble association, and though this is not correct it is true that cases of indissoluble association are *ipso facto* cases of belief. But Prof. Stout

(a) Sully, *op. cit.*, p. 304.

(b) Bain, *op. cit.*, p. 379.

points out this relative inseparability is not merely dependent on the strength and intimacy of the association between the ideas connected, but also on the absence of counter associations : "The closest associations between A & B fails to enforce the combination AB, if this combination is opposed in any instance by sufficiently powerful counter associations On the other hand a comparatively feeble association may command belief, merely from the absence of counter association." (a) Now, when the evidence for the prosecution is concluded, there is usually an association of ideas set up in the magistrate's mind between the facts related and the guilt of the accused, and the defence to succeed must set up a counter association between the facts and some other explanation. Thus, if the facts are represented by A and the guilt of the accused by B, the connection AB must be altered to one AC, but it is of very little use to try and produce a connection BC which has no direct association with A. A mere *alibi*, therefore, which only indirectly counteracts the facts proved, has not nearly the same influence on the magistrate's mind, as the defence which accepts these facts but explains them otherwise, for the *alibi* neglects A altogether. A good advocate knows this and always has a theory to account for the prosecution's case, and very rarely leaves it alone and relies on an *alibi*. To connect the crime with the prosecution's chief witness is a particularly effective defence, because it at once serves to break the original association between A and B, and to create a new and opposite one between A and E : this once done it is not easy to retrace the old association; for the nervous current has been diverted, and the mind is now able to take two directions from A, which, as we have pointed out above, is the essential condition of doubt.

Imagination and
Belief.

The effect of imagination on belief is through the formation of vivid ideas : dwelling on these we come to regard them as representative of reality. But such Beliefs are usually momentary

(a) Stout, *op. cit.*, Vol. II, p. 252.

in persons of normal mind and immediately corrected on reflection, because the ideas are not definitely localised in time and space. (a) The well-known danger of playing with an idea is partly due to the fact that what is constantly attended to is thereby strengthened, and partly to ideo-motor action, *i.e.*, the tendency of an idea to realise itself in action.

8. It has been said that the Inconceivability of the Opposite Truth. is a test of Belief but not of Truth as Herbert Spencer claimed for it. Many writers do not profess to give a test of truth or consider that the test varies with the purpose to be served and so speak of the "useful, efficient, workable, to which our practical experience tends to restrict our truth-valuations." (b) If we must adopt one it will have to be 'consistency' in some form: "Everywhere alike," says Mr. Underhill, "consistency of all the elements with the whole and with each other—the elements both of knowledge and of practice—is the only and the ultimate test of truth," (c) and consistency is really Mr. Bradley's test, which he applies both to Truth and Reality. He speaks of self-contradiction as the test of reality which denies inconsistency and asserts consistency, and says that an assertion is false because reality does not admit of two inconsistent (discrepant) events. (d)

The consistency, however, in practice must be with our knowledge and with our experience, and when Impossibility. we speak of a thing as impossible we mean that it is so because it contradicts positive knowledge; because, that is, it cannot be unless something which we hold as true is, as such, to be given up. As, however, our knowledge is finite and fallible, it may always be that what is at one time impossible is at another possible, but the stronger and more systematic and fully

(a) Sully, *op. cit.*, pp. 236, 301.

Abuse of Final Causes, *Mind* N. S. 50, p. 239.

(b) F. C. S. Schiller, *Humanism*, p. 59.

(d) *Appearance and Reality*, pp.

(c) G. E. Underhill, *the Use and*

136, 139, 190.

organised a body of knowledge becomes, so much the more impossible becomes that which in any point conflicts with it. (a)

In section 56 of the Indian Contract Act it is said that, 'an agreement to do an act impossible in itself is void', and this is distinguished by the commentators as 'intrinsic impossibility' as opposed to what is 'merely impossible relatively to the person agreeing' and they give as an instance of the latter kind of impossibility, an agreement by a pauper to pay Rs. 10,000, which would be impossible with reference to his resources, but not inherently impossible. In the former case of intrinsic impossibility the contract is void but not in the latter case of relative impossibility.(b)

We think ourselves that the distinction drawn is not really a valid one ; it is as much inherently impossible for a pauper, so long as he remains a pauper, to pay Rs. 10,000, as it is for a man to walk 100 miles an hour or to discover treasure by magic (examples apparently given of intrinsic impossibility), and it is only by conceiving the conditions altered and the man no longer a pauper—a form of fallacy alluded to earlier in the chapter—that you can speak of his agreement as other than impossible, whatever shade of meaning you may assign to the latter word. For so far as possibility goes both agreements are equally contradictory of man's positive knowledge. With respect to the agreement to discover treasure by magic, it is said "it is immaterial that some people think the thing to be possible, for there are many in this country that think it possible to discover treasure by magic ; still an act is not necessarily impossible because it is not yet known to be possible, for in a more advanced state of scientific knowledge the possibility of it may come to be demonstrated."

The latter statement is undoubtedly correct and is the reason why the inconceivability of the opposite cannot be taken as the

(a) Appearance and Reality.
pp. 391, 537, 542-3.

(b) Cunningham and Shephard's 9th
Edn. of the Indian Contract Act, p. 188.

test of truth : the former statement is open to doubt, and indeed what the whole sentence really points to is that there is no such thing as the intrinsically impossible. To be 'impossible in itself,' according to the commentators, a thing must be 'absolutely and generally impossible,' and to know this we must have an all-embracing knowledge of reality which we do not possess, as they themselves say. For it is only when we have exhausted the field of possibility that we can speak of a thing as absolutely impossible.

The same remarks apply to Sir Frederick Pollock's instances. An agreement, he says, "may be impossible in itself ; that is, the agreement itself may involve a contradiction, as if it contains promises inconsistent with one another or with the date of the agreement, or the thing contracted for may be contrary to the course of nature, *quod natura fieri non concedit* as if a man should undertake to make a river run uphill ; to make two spheres of the same substance, but one twice the size of the other, of which the greater should fall twice as fast as the smaller when they were both dropped from a height ; or to construct a perpetual motion".(a)

Now the first class of cases are impossible not because of anything intrinsic in the matters themselves, but because our knowledge of existence or, if we prefer it, our experience of what we call reality, our conception of the time-relation, &c., teach us that the co-existence asserted contradicts what we know : the second class of cases is only the same thing put in other words. For there is no such thing as a course of Nature existing apart from our knowledge, and such a conception merely betrays ignorance of the true meaning of Nature. It is an "unwarrantable assumption that the realm of Nature is primary, independent, and complete in itself Nature, as we conceive it, is, on the contrary, merely an abstract scheme and that, as such, it necessarily presupposes intellectual constructiveness, and motives to sustain the labour that such construction entails."(b) As we have already

(a) Pollock, Principles of Contract,
p. 398.

(b) J. Ward, Naturalism & Agnosticism,
Vol. II, p. 247.

explained(*a*) the laws of Nature are simply what our knowledge makes them, and vary with it. The error of all these descriptions arises from the attempt to regard things as possible and impossible, not as related to other things, but somehow out of all relations: where as 'possible' and 'impossible' have no meaning except in relation to thought and simply are the ways we relate or fail to relate anything to reality.

Sir F. Pollock himself comes to a somewhat halting conclusion not very far off our own, when after quoting Brett, J., that in these cases of intrinsic impossibility "the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties cannot be supposed to have so contracted;" he adds "It seems to follow then that the question is not whether a thing is absolutely impossible (a question not always without difficulty), but whether it is such that reasonable men in the position of the parties must treat it as impossible."*(b)* This translated into our language would be "whether it contradicts the positive knowledge of reasonable men in the position of the parties," though for ourselves, for the reasons elsewhere given, we should prefer to avoid reference to 'the reasonable man.' It constitutes, however, an admission that this form of impossibility is relative and not absolute; though the same writer does proceed to speak of these cases as 'the first or objective kind of impossibility.'

9. Few judges who give reasons for their conclusions fail to refer to Probability, and the books on

Probability.

Evidence are full of allusions to it. "The

foundation of this (that is judgment)," says Best, "is the probability or likelihood of that agreement or disagreement, of that truth or falsehood, deduced or presumed from its conformity or repugnancy to our knowledge, observation and experience."*(c)*

And again "By probability, as already observed, is meant the likelihood of anything to be true deduced from its conformity to our knowledge, observation and experience. When a supposed

(*a*) See p. 148.

(*c*) Best on Evidence, § 7.

(*b*) Pollock, *op. cit.*, pp. 400-1.

fact is so repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible or physically impossible. There is likewise moral impossibility which, however, is nothing more than a high degree of improbability.”(a)

If then impossibility is that which contradicts man's positive knowledge, probability is that which is in conformity with it. This, however, is not sufficient as a definition, for probability implies further some degree of uncertainty which arises from the fact that we are not in possession of full knowledge of the matter : what we pronounce to be probable agrees with such knowledge or experience as we have, but we feel that the knowledge is insufficient. “There are stages of belief,” says Mr. Hobhouse, “in every gradation between certainty and doubt, containing admixtures of truth and error in every proportion ; and this for the simple reason, that the grounds are not always discovered at once, but are revealed to the enquirer bit by bit.” “Now just as full certainty has or may have its rational ground, so also may lower degrees of belief, and to this ground the term ‘probable’ has reference.”(b) The same writer goes on to state that the object of reason in employing partial knowledge is (1) to form conclusions which, without being always true, will approximate to truth more nearly than any others, and (2) with regard to any given conclusion to maintain that state of belief which will serve it best relatively to other considerations, speculative or practical. A probable conclusion then is one which is not merely held, as a matter of psychological fact, with a certain degree of felt conviction. It is one which ought to be so held; that is to say, it is held on grounds which, on the above principles, justify such a degree of belief, no more and no less. It must rest accordingly, (1) on certain known facts, and (2) on certain methods of forming conclusions from those facts.(c)

(a) Best on Evidence, § 24.

ledge, pp. 291-2. °

(b) L.T. Hobhouse, Theory of Know-

(c) *Ibid.*, p. 292.

This seems to be an accurate description of what the judge's mental attitude should be : what seems probable at one stage of the case must be held so only so far as it is remembered that at present it rests on partial grounds ; with further evidence and more knowledge the grounds become wider and the degree of conviction greater on either one side or the other, but to fail to recognise the provisional character of the first conclusion is to blindly adhere to a theory which rests on insufficient basis, and is a mark of one of the worst forms of prejudice. It is the attitude of the woman who prides herself on judging character at first sight and never being wrong, which merely means that she is unable to change her first conviction formed on partial knowledge, be the facts what they may.

It now remains to examine how in the first place we come to adopt one conclusion rather than another as probable. It has already been explained that this depends on our knowledge, observation and experience : whatever is in accordance with this is in the first instance regarded as probable, and hence the enormous advantage of the man who has the greater experience. Any observed uniform relation is a possible basis for generalization, and "on the one hand each element of likeness between a given case and a known ground is *pro tanto*, in the absence of other knowledge, a consideration in favour of the consequent. On the other hand every difference is a counter consideration. The balance of the two gives us a degree of probability which is thus dependent on the degree of likeness." The more frequently therefore anything has happened in our experience, the more probable it appears that it will happen again, and it is this average frequency which the law of probability lays down.(a)

And if we choose to follow this line we can arrive at another conception of what is reasonable doubt in somewhat less psychological terms than the one already given in para. 4 ; "Reasonable and unreasonable, logical and illogical, may be sounds

(a) L. T. Hobhouse, *Theory of Knowledge*, pp. 294-5, 298-300.

signifying nothing, or may merely express certain common ways of believing or forming beliefs The true criterion of the reasonable then, is the actual conformity of its conclusions with fact; while conversely, that which does not lead us to conformity with fact can have no claim to be considered reasonable”(a) and by ‘fact’ must be understood that partial knowledge which constitutes our experience. We are then justified in doubting a thing in so far as it is not in conformity with what we ourselves have experienced, and so it will follow that the narrower our experience, the more we shall regard ourselves justified in doubting, and our views of ‘reasonable doubt’ will vary in inverse proportion to our experience.

10. Reference has already been made to Proof, and our analysis of the Probable will now enable us to distinguish it from Demonstration and to show what kind of possibility may be legitimately excluded from consideration. “You may show,” says Mr. Bradley, “that every detail we know points towards one result, and we can find no special reason for taking this result as false. And having done so much you have certainly proved your conclusion. But, even after this, a doubt remains with regard to what is possible. And unless all other possibilities can be disposed of you have failed to demonstrate.”(b)

This statement, it seems to us, cannot be improved on, and considering the partial character of human knowledge we are justified in neglecting the remaining possibilities whatever they may be, when we have reached the result described above as proof.

We have not in this chapter treated of truth-speaking which belongs rather to the general subject of evidence, but we shall here apply to it conclusions drawn from probability, as to why a European’s evidence may legitimately be preferred to that of a

European and
Native Evidence

(a) L. T. Hobhouse, Theory of Knowledge, p. 291.

(b) Appearance and Reality, p. 325.

Native witness; for we wish to contest the theory that ‘ a black man’s word is as good as a white man’s.’

The view disputed is based merely on numerical equality, and the old utilitarian theory that every man is to count for one and no one for more than one, and this being so as Bentham said, ‘ Pushpin is as good as Poetry.’ Now it is obvious that if probability means conformity with our experience, and our experience is to the effect that the European is habitually more truthful than the Native, we are justified in regarding it as probable that in any individual instance in which their statements are contradictory, it is the European who is speaking the truth. Indeed to do otherwise is to discard what we ordinarily use as a test of truth, and to embrace instead a standard, *viz.*, that of numerical equality, which our experience has informed us is inapplicable to all mankind so far as veracity is concerned. It is true that in some cases the native witness or witnesses may be on oath and the European may be an accused who is not speaking on oath, but here again if our experience is that the sanctity of an oath has little or no binding force on one race while it has on another, the probability of its influencing the matter will be determined accordingly, and it is then mere folly to affect to conclude that because one race has shewn in the past that an oath is revered among it, therefore the same must necessarily be true of all races.

Each magistrate or judge will have had his own experience on the subject, and it is almost needless to say that he should use it fearlessly regardless of theories and the apparent simplicity of the numerical equality view, but for the sake of the weaker folk who do not care to face the music unless they can make a show of arguing on paper, we subjoin two reasons why it would naturally be expected that the European would be the more truthful witness.

The first is drawn from the nature of secretiveness which is regarded by Prof. James as an instinct and often as a blind propensity. “ The impulse to conceal,” he says, “ is more apt to be

provoked by superiors than by equals or inferiors. How differently do boys talk together when their parents are not by ! Servants see more of their masters' characters than masters of servants'." (a) Now the writer does not wish to insist offensively on the superiority of the European race, but it is necessary to the argument to so far assert it as to say that the European Magistrates are in such a position of superiority towards the natives as to cause them to be secretive, while they are not as regards the European witness, who usually both is and considers himself to be an equal of the judge. It is well known, it is believed, to Europeans who have resided for any time in Burma that Burmans will, as a rule, tell you nothing until they know you well, and that the native officials are far more successful on the whole in arriving at the facts of a matter than the European Officer.

The second ground will be found referred to elsewhere in the remarks on differences of race : veracity is the special virtue of an industrial nation, because it is so essential to commerce, and so it comes to be regarded as the first virtue in the moral code and inculcated everywhere among that people both by example and precept. Hence the British nation have always prized it, and they are probably the most truth-speaking race in the world. In the East the conditions are different, and the inhabitants have never valued it to the same extent, but have laid greater stress on other virtues, and so it has naturally resulted that they have exhibited a want of truth, which, in the writer's opinion, has led the European to unduly condemn them, but which serves to explain why their testimony in the law Courts is not of equivalent value to that of a European. (b)

11. We propose to conclude this chapter with a criticism on the views of a well-known writer on Truth, Belief and Reasonable Doubt. Sir James Stephen objected to a proposal that a certain

Sir James Stephen's
View of Truth.

(a) James, *op. cit.*, Vol. II, pp. 433-4. Th. Fowler, *Progressive Morality*,
(b) Chap. XV, para. 4. *cf.* also pp. 114-5.

number of scientific men should, under circumstances, sit upon juries, on the ground that this assumes that the object of judicial trials is the attainment of truth simply, and that scientific men are more likely to attain it than others. He urges that "the result to be reached is not truth simply but such an approach to truth as the average run of men are capable of making, and that this result is more likely to be found in the opinions of common than in those of scientific jurors." (a)

The question to be tried is not whether the man is guilty, but whether the jury have any reasonable doubt that he is guilty, and the juror is not a scientific enquirer but has only to say whether or not certain evidence satisfies his mind. As he regarded it, the minds of twelve men who represent the average intelligence of the country have to be satisfied, and that is the standard of proof created by the legislature. (b) These men are to use the established opinions of the bulk of the Society in which they live and apply them to the matters that come before them, and on this ground he defends the decisions of juries in the past—convicting persons of such crimes as witchcraft, which are now regarded as impossible. "It is clear," he says, "that they could not have acted otherwise than they did, and that it would have been an unreasonable proceeding on their parts to enter upon what was then regarded as the fanciful speculation which denied that witchcraft ever took place." (c) And again, "Their (*i. e.*, of the public) reasonable demand is, that no one shall be punished unless his guilt can be proved on grounds which the bulk of the nation at large can understand. An omniscient and infallible judge who decided by processes unintelligible to the world at large would not give satisfaction, for though his decisions might always be right, no one could check them". (d)

Let us try and realise what this amounts to. It seems to us a deliberate rejection of knowledge by the ignorant, on the ground

(a) Stephen, *A general view of the Criminal Law of England*, pp. 209-10.

(b) *Ibid.*, n. 264.

(c) *Ibid.*, p. 211.

(d) *Ibid.*, p. 213.

that because their minds can be satisfied without it that is sufficient. It is a setting up as the lawyers' standard of truth the comprehension of the less as against the intelligence of the more educated, and of those who have specially devoted themselves to the study of matters which have to be decided in a law Court, but which are not easily intelligible to the ordinary mind. One can realise and perhaps appreciate the attitude of the man who prefers *Cum Platone errare quam cum istis vera sentire*, but what is to be said of the class of men whose motto is *malo cum istis errare quam cum Platone vera sentire* ! Could such a notion appeal to any but the legal intellect, and if it is pursued, is there not an end at once of all progress in every sort of knowledge and an indefinite postponement of all prospect of arriving at the truth in any but the most ordinary matters ?

Logically followed it would condemn the appointment of judges, in countries where trials are not by jury, of any persons whose intelligence is superior to that of the man in the street, it would completely exclude the appointment of educated European judges to decide the cases of Indians and other native races, because the latter would not be able to check the decisions of the former ! The European judges here would be very much in the position of the omniscient and infallible judge deciding by processes unintelligible to those around him, whose decisions our author would consider unsatisfactory. The Legal Science is as much an expert Science as any other to the plain man, and lawyers clearly claim to be experts, if not to have the monopoly of such knowledge ; the barrister judges who deal with the technicalities of law decide cases by 'processes unintelligible to the world at large,' *ergo* their decisions are unsatisfactory, and they are not the type of judges required. We do not see how such a result can be avoided according to our author's reasoning, and though the conclusion may not perhaps be unwelcome to some readers, we doubt if the grounds on which it proceeds would be accepted by any.

12. We will now pass on to the same writer's views on Belief and Reasonable Doubt. "The desire to act and the desire to act successfully are ultimate facts in human nature; but we are

His explanation of Belief and Reasonable Doubt.

so constituted that all actions involve belief, and the world is so arranged that all successful action involves true belief. Hence the ultimate reason for believing is that without belief men cannot act. And the reason for believing what is true, is, that without true belief they cannot act successfully; thus the advantage derived from true as distinguished from false belief, and not the bare fact that the thing is true, is the reason for believing what is true Hence, belief is not a mere impression which the mind receives passively from the contemplation of facts external to it, but an active habit involving an exertion of the will." (a)

He subsequently applies this view of belief to reasonable doubt as follows:—"What doubts then are reasonable? That depends upon the explanation already given as to the nature of belief. Where it is not wise to believe, it is wise to doubt, and the wisdom of belief, in any particular instance, is a question of the balance of advantages. In every intelligence which is not omniscient there is room for doubt on every subject, for such an intelligence can never assert that if its knowledge were increased its present belief would not be changed" (b) . . . "Thus whether or not a given man at a given time is as a matter of fact certain of a given conclusion, or whether he feels a doubt about it which he will call reasonable, is a question of fact; whether he shall put his mind into such a state, is a question of expediency and one of the gravest importance a question which depends not on any one consideration, but on a comparison of several, the most important of which are the reasons for forming an opinion, the consequences of the opinion when formed, the weight and completeness of the testimony, and the probability of the matter

(a) Stephen, *A general view of the Criminal Law of England*, p. 242. (b) *Ibid.*, p. 260.

testified to. The force of any one of these reasons for belief may be so great as to make a man unconscious of the presence of the others for the time being" (and he finally concludes) "To try and set a precise limit to these processes—to attempt to give a specific meaning to the word "reasonable" in the phrases 'reasonable doubt' or 'reasonable conjecture' is trying to count what is not number, and to measure what is not space." (a)

Now, in the first place, it seems to us that effects are here attributed to a wrong cause. We do not deny that what we believe about the future often influences the actual event so far as it depends on our actions. So far faith is an actual force, but, as Mr. Hobhouse says, "What has operated in these cases is not the insufficiently grounded belief but the attitude of will, the resolute, high-spirited, unswerving determination which carries a man on. And from this distinction we may learn a lesson which may be applied in other cases. It is not the ungrounded and perhaps incorrect belief which is intrinsically valuable, but the state of feeling, emotion, and will from which that belief issues and to which it ministers. In practical affairs, in so far as the premature belief itself is essential, there is too often the Nemesis of rashness or other misdirection of effort, and if philosophical analysis is to be applied to these matters, it must surely be allowed to go below the surface, and separate what is of genuine value from what is superabundant and possibly hurtful." (b).

Next, the assertion here is that the reason for believing what is true is not that the thing is true itself, but that a true belief brings advantages to the believer while a false belief brings disadvantages to him. But if the consequences of a belief are what makes it true, how can a person recognise that a belief is true before he knows its consequence? And if he does

(a) Stephen, *A general view of the Criminal Law of England*, p. 262.

(b) L. T. Hobhouse. *Faith and the*

will to believe, Aristotelean Society Proceedings, 1903-4, p. 91.

not recognise it as true at the time he forms the belief, but only after subsequently coming to know the consequences is able to say that the belief is true, how can it be said that the consequences have in any way influenced him to form a true belief? What is subsequent in time cannot be the cause of what precedes it, unless by 'cause' you mean 'purpose,' 'end,' &c., which is evidently not the meaning here when 'the reason for believing what is true' is spoken of.

It appears to us that there is considerable confusion in the reasoning in the shape of conclusions which do not legitimately follow from the premises. In the first place it cannot be argued, as our author argues, that because all successful action involves true belief, therefore the success of the action is the reason for believing what is true. This is simply an inversion of the antecedent and consequent: the belief must be prior to the action as it is said that without belief men cannot act, and therefore, if there is any case of cause and effect, the correct inference to our mind would rather be that the truth of the belief is the cause of the successful action and not *vice versa*.

Secondly, it does not follow that because the ultimate reason for *believing* is that belief is necessary to *action*, therefore the reason for believing *what is true* is that without *true* belief we cannot act *successfully*. Here additions have been made to both sides of the equation that are not the same by the introduction of the terms 'true' and 'successful': to take 'successful' as synonymous with 'true' is simply to beg the whole question at issue, for it is equivalent to assuming outright that that only is true which is advantageous. Assert if you like that this is a self-evident proposition, and possibly you will get some to accept it, but do not pretend to arrive at this conclusion by the species of syllogistic reasoning employed in the present passage.

But let us look at the matter in another way. To believe anything is to believe that it is true, so that its truth must be conceived of as something different from its consequences. For it is absurd to say that the truth of a belief consists in the

consequences of its truth, for in the very act of identifying its truth with its consequences, you are opposing them one to another.

Is it then meant that a belief is true because it (and not its truth) has practical consequences? If so, what are the consequences of a belief as distinguished from those of its truth? We confess that we can give no answer to this: that true beliefs have practical consequences we admit, but we believe in the consequences because we believe in the truth, and settle the question of truth or falsehood independently. (a) How this is done we shall now explain by a reference to psychology.

13. It may be urged against the view we have been criticizing that in addition to its other defects such a theory only takes account of half the facts.

Psychological explanation of true and false beliefs.

Faith in a fact may help to create the fact provided our own activity enters into the determination of the fact, but not otherwise. (b) So long as a man is strenuously aiming at the achievement of practical ends, only certain combinations of ideas are possible to him, because others would check action: the urgency of practical needs may make it necessary for him to come to a decision at any cost however scanty his materials for doing so may be. In such a case as, *e.g.*, of a man who climbs a cliff to escape death from drowning, he must form a belief consistent with action because of the advantage to him of doing so. His mental activity, however, may be directed towards other ends, and if his mind is not bent on the achievement of practical results, entirely different combinations of ideas may be possible for him, provided that they do not involve an explicit contradiction. Now the judge or the juror who has to form a decision in a case has no such urgent practical need to action as the man, *e.g.*, who has to jump an abyss to avoid

(a) *U. The Criticism of the Pragmatist view of Truth* by H. W. B. Joseph in *Mind*. N. S. No. 53.

pp 29-30.

(b) James, *Will to Believe*, pp. 24-5, 59-60.

some other danger : his practical need is limited to the necessity of coming to some decision, and as either a right or wrong decision will accomplish this object, it is not clear that he will derive any particular advantage from having a true belief in the matter. A belief which is in fact false but which is helpful to him by enabling him to solve some contradiction or difficulty which has arisen, is one which he would be likely to cling to, if the advantage of the belief were the sole reason of its formation. What restrains him here is his own connected system of ideas, his own preformed system of beliefs: these prevent him from arbitrarily selecting any means to the desired end, and only allow him to make certain mental combinations which do not collide with them.

We maintain that the theory we are criticising only takes account of half the facts because it explains the formation of beliefs entirely by the influence of subjective needs, whereas they can never be the sole factor.^(c) It is true that in striving after an end we strive after the belief which alone makes action with a view to that end a psychological possibility, and that the subjective factor thus constitutes the impelling motives for the formation of belief, but this is not a complete explanation. There is also the objective factor in belief which controls and limits subjective activity so as to enforce one way of thinking and to make other ways difficult or impossible : we call it objective to distinguish it from the other factor and because it may appear to proceed from the nature of external objects, but what is really operative is the association of ideas or view of objective relations which has already been formed in the past. It is merely a subjective connexion of ideas which has become a system and excludes the connexion of things or events suggested by the new association. It is this side of belief which appears to us to play the chief part in doubt, and when we say that doubt is reasonable or not according to the extent to which you can think the opposite or alternative of the

(c) See Stout, *Manual of Psychology*, p. 567, and his Chapter on

Belief, *passim*, which is largely borrowed from here in the text.

proposition affirmed, (a) we are simply asserting that a thing is really doubtful or not according as the association of ideas it suggests conflicts or does not conflict with the established system of ideas of the thinker.

If this be true, it appears to us misleading to say that "belief is not a mere impression which the mind receives passively from the contemplation of facts external to it, but an active habit involving an exertion of the will," because you cannot disregard your established system of ideas and make what belief you like by mere exertion of the will: nor again is it true that 'doubt is a question of the balance of advantages.' It is not in your power to make it such, nor can a man 'put his mind' into a state of doubts according as it is expedient or not, as he cannot control the extent to which a suggested ideal connexion will conflict with his existing system of ideas. When Sir James Stephen concludes with the assertion that the question of doubting or not depends chiefly on the reasons for forming an opinion the consequences of the opinion when formed, the weight and completeness of the testimony, and the probability of the matter testified to, we should exclude the first two considerations altogether as an explanation of doubt, and should describe the last two as being really the same from different points of view and both ultimately explicable by the test which we have suggested above.

(d) See page 229, *supra*

CHAPTER IX.

FEELING—IMAGINATION—PREJUDICE—HABIT.

Feeling and Emotion—The motor character of Emotions—Demeanour of Witnesses—Effect of Emotion on the Intellect—and on Belief—In what Modesty consists—The Offence of Assault with intent to insult the modesty of a Woman—Surprise—Imagination—its basis is observation and reproduction—it is limited by experience—An example given of seeking for analogies in one's own mental life—Prejudice—in observation—in thought—due to habit and the influence of feeling on ideas—Habit—its effect on the legal mind—The legal presumption that what is, continues—its validity when applied to character and opinions—Continuity and habit not the same—of what character consists—Evidence of character in law—Evidence of reputation distinguished from evidence of disposition—Unsatisfactory nature of the former.

THE effect of Feeling and the Emotions in Attention, Memory, Belief, Will and Action is spoken of else-

Feelings and Emotions described.

where in the chapters relating to those subjects: here a few further remarks will be given which do not come appropriately under those heads. Feeling cannot be defined, but the conditions under which it arises can be stated and the relations obtaining between the ideas present at the moment of its appearance. Feelings are always subjective and imply an affection of activity of the self, ideas have an objective reference: Emotions like feelings are subjective processes, but they involve change in ideation and re-actions in the organs of movement. Feelings are not accessible to external observation until they pass over into emotions.(a)

The importance of the emotions is recognised in law in the stress which is laid on the observation of demeanour of witnesses, and we shall first try to show the reason of this by an explanation

The motor character of Emotions.

(a) Wundt, Human and Animal Psychology, pp. 211, 218, 372.

of the motor character of emotion. "The foundation of emotional life," says Ribot, "rests in tendencies whether conscious or not (consciousness in all this playing but a secondary part), and the only positive idea we can get of these tendencies is to consider them as movements (or as inhibitions of movements), be they real or nascent. A craving, an inclination, a desire always imply motor innervation in some degree or other."(a).

Proclivities, inclinations, desires—all these words and their synonyms signify a nascent or miscarried movement according as it is capable of being evolved to its extreme limit or is obliged to undergo arrest of development. The state of concomitant consciousness may indifferently appear or disappear; the tendency may be conscious or unconscious; yet the motor innervation none the less remains as the fundamental element.(b)

The fact that the emotions have their root in the organism renders them less liable to control and makes them a valuable index of the feelings, for, as Darwin expresses it, they are independent of the will: "Certain actions which we recognise as expressive of certain states of mind are the direct result of the constitution of the nervous system, and have been from the first independent of the will and to a large extent of habit."(c) Similarly Professor Sully speaking of the expression of the emotions says it is 'a wide ranging reflex motor excitation involving some at least of the 'voluntary' muscles as well as those by which the vital actions, *e.g.*, circulation, digestion are carried out, and finally, the nerve structures which are known to influence the action of the several secreting organs, as the salivary and lachrymal glands. This reflex diffusion of the nervous excitation in emotional stimulation is a primitive fact of our organisation. It shows distinctly in the first weeks of life. It has much in common with those reflex movements which are brought about by congenital

(a) Ribot, on Attention, p. 110.

(b) *Ibid.*, p. 111.

(c) Darwin, Expression of the Emotions, p. 66.

arrangements, and which, as we shall see later on, form one of the main rudiments of voluntary action. What we call the expression of an emotion is merely that part of this re-action which is observable to others, and which helps us to read one another's feelings." (a)

Some writers hold that the movements are not merely expressions of the emotions but actually part of them. Thus in hypnotic experiments it was found that the expressive movements given by the experimenter to different parts of the body are always immediately reflected in the countenance, which thus completes the expression. If, *e.g.*, the fists are clenched, the brows contract and the face expresses anger. It is said that "the chief conclusion to be drawn from these studies is the influence exerted on psychical activity by the expressive movements of the countenance and the whole body. The expression is not merely an external sign of the emotion, but it forms an integral part of it. Even in the normal state, when an expression is artificially produced it gives rise to the corresponding emotion which passes away when the expression changes," and Burke's words are quoted that he had often experienced the awakening of the passion of anger in proportion as he assumed the external signs of that passion. (b)

Professor James goes so far as to maintain that the usual view, namely, that the mental perception of some fact excites the mental affection called the emotion, and that this latter state of mind gives rise to the bodily expression, is wrong and that the facts rather are that "the bodily changes follow directly the perception of the exciting fact, and that our feeling of the same changes as they occur, *is* the emotion." (c) Although this theory is not generally accepted the great importance of these movements which constitute the expression of the emotions is everywhere admitted, and the difficulty of simulating emotions

(a) Sully, *Outlines of Psychology*, 2nd ed., pp. 277-280.
p. 342.

(c) W. James, *Principles of Psychology*, Vol. II, p. 449.

(b) Binet and Féré, *Animal Magnet-*

owing to the large number of parts modified in each emotion has elsewhere been remarked on.

2. It is not, therefore, surprising that there are numerous decisions as to the importance of demeanour and that for this reason it has been laid down that “in all cases in which the evidence is conflicting, it is the duty of a Court of Appeal to have great regard to the opinion formed by the judge in whose presence the witnesses gave their evidence, as to the degree of credit to be given to it.”(a) Further both in the Civil and Criminal Procedure Codes Courts are empowered to record remarks on the demeanour of witnesses, and one of the chief objections to issuing commissions for the examination of witnesses at a distance has been held to be that it deprives the judge who is trying the case of the opportunity of observing their demeanour. We cannot help feeling that too little attention is often paid to this advice, and this is the main reason which has led us to explain the importance of the emotions by reference to their motor character. The treatment of the subject, *e.g.*, by Best seems somewhat brief, and though quotations are given acknowledging how important the matter is, more space is devoted to minimising what is to be gained by it than one would naturally expect, and the general effect is to leave the reader under the impression that the results of such observation are too uncertain to be really valuable.(b) That wrong inferences are never drawn of course no one would maintain, and one source of such mistakes has been indicated by Wundt in the following passage:—“The physical concomitants stand in no *constant* relation to the *psychical quality* of the emotions. This holds especially for the effects on pulse and respiration, but it is true also for the pantomimetic expressive movements. It may sometimes happen that emotions with very different, even opposite kinds of affective contents, may belong to the same class so far as the accompanying physical phenomena are concerned. Thus, for

(a) See the cases quoted by Ameer Ali and Woodroffe, 2nd Edn. of the

Indian Evidence Act, p. 26, Note 3.

(b) Best on Evidence, §§ 21, 446.

example, joy and anger may be in like manner Sthenic emotions. Joy accompanied by surprise may, on the contrary present the appearance on its physical side of an Asthenic emotion.”(a) It is well to bear this caution in mind, but the writer can himself recollect instances in which the demeanour of the witnesses so plainly indicated the falsity of their evidence as to completely alter the effect of their statements which on paper were not inconsistent with one another and so indicated nothing wrong.

Especially when dealing with less civilized races can we obtain information by observing their emotions, for the control of the emotions is a product of civilization and is natural only to the morally and intellectually mature consciousness. “Generally,” says Dr. Ward, “in the particular movements indicative of particular emotions the primary and primitive effects of feeling are overlaid by what Darwin has called serviceable associated habits. The purposive actions of an earlier stage of development become, though somewhat atrophied as it were, the emotive outlet of a later stage : in the circumstances in which our ancestors worried their enemies we only show our teeth.”(b) If, therefore, we learn to read them aright, observation of the emotions of Eastern races will doubtless prove unusually instructive, and the study of psychology which embraces the subject cannot fail to assist, for it classifies the symptoms which follow the different states of mind.

3. Emotion is a great source of illusion because it disturbs intellectual operations. It gives a preternatural vividness and persistence to the ideas answering to it, *i.e.*, the ideas which are its excitants or which are otherwise associated with it : hence when the mind is under the temporary sway of any feelings as, *e.g.*, fear, there will be a readiness to interpret objects by help of images congruent with the emotion. A man under the control

(a) Wundt, *Outlines of Psychology*,
p. 193.

Encyclopædia Britannica, 9th Edn., Vol.
XX, p. 72.

(b) J. Ward, *Art Psychology*, Ency-

of fear will be apt to see any kind of fear-inspiring object whenever there is any resemblance to such in the things actually present to his vision.(a) The same writer also says that we habitually think the thoughts that please us, those which connect themselves with and gratify our feelings.

The state of emotion (apart from its promotion of the flow of ideas if it be not too strong) is antagonistic to thinking, which implies at the moment a certain subsidence of the feelings and a considerable suppression of outward action or movement, but to paralyse the intellectual activity it must be very strong.(b) Its more frequent effect is to warp it and cause the person judging to be prejudiced and to bar out all considerations on the other side. 1

First thoughts, as contrasted with second thoughts, are concerned with emotion : they are the impulse to act in a certain way, and the fact that they are neutralised by second thoughts proves that they come from a deeper region than thought. They are subconscious, instructive, and express what is most deeply engrained in us by heredity or most early acquired.

Professor James explains our tendency to believe in emotionally-exciting objects (objects of fear, desire, &c.), as due to the bodily sensations which emotions involve, for the more a conceived object excites us the more reality it has : and he considers the greatest proof that a man is *Sui compos* to be his ability to suspend belief in presence of an emotionally-exciting idea.(c) Now, this power is the result of education, and does not exist in untutored minds for which every exciting thought carries credence. He also quotes Bagehot to the effect that 'conviction will be found to be one of the intensest of human emotions and one most closely connected with the bodily state,' and himself concludes that the reason of the belief is undoubtedly the bodily commotion which the exciting idea sets up.

(a) Sully, *Illusions*, p. 103.

pp. 37-8, 341.

(b) Sully, *Outlines of Psychology*,

(c) James, *op. cit.*, Vol. II, pp. 307-8.

This will explain the movements and excitement of fanatics, the marching of the Salvation Army, the gesticulations of preachers and orators, &c., though such manifestations may be partly due to the tendency, alluded to above, to excite a feeling by first adopting the attitude appropriate to it.

4. It would take too long to analyse all the emotions : anger has been described elsewhere and here we
Modesty. shall be content to say something about

Modesty and Surprise. There is an offence in the Indian Criminal law known as assault with intent to insult the modesty of a woman, and as it is within the writer's knowledge that very different views are held as to what constitutes this offence, it seems necessary to arrive at some clear idea of what is at the root of this feeling. Speaking of it Professor James says : " Now what may the impulsive root be ? I believe that, for one thing it is shyness, the feeling of dread that unfamiliar persons, as explained above, may inspire withal. Such persons are the original stimuli to our modesty,"(a) and he quotes Th. Waitz that "we often find modesty coming in only in the presence of foreigners, especially of clothed Europeans. Only before these do the Indian women in Brazil cover themselves with their girdle, only before these do the women on Timor conceal their bosom. In Australia we find the same thing happening."(b) He then proceeds : " But the actions of modesty are quite different from the actions of shyness. They consist of the restraint of certain bodily functions, and of the covering of certain parts ; and why do such particular actions necessarily ensue ? That there may be in the human animal, as such, a ' blind ' and immediate automatic impulse to such restraints and coverings in respect—inspiring presences is a possibility difficult of actual disproof. But it seems more likely, from the facts, that the actions of modesty are suggested to us in a roundabout way ; and that, even more than those of

(a) James, *op. cit.*, Vol. II, p. 436 and Note.

(b) Th. Waitz, *Anthropologie der Natur völker*, Vol. I, p. 358.

cleanliness, they arise from the application in the second instance to ourselves of judgments primarily passed upon our mates." These judgments are traced to the fact that everywhere unusual cynicism and indecency inspires contempt and reserve inspires some respect, and almost every one therefore resolves not to be like such indecent persons, which feeling is sharpened into a real fit of shyness by some person being present whom it was important not to displease.

Modesty, therefore, though in some shape a natural and inevitable feature of human life, need not necessarily be an instinct in the pure and simple excito-motor sense of the term.(a)

There is a prevalent view that if force is used to a woman, the offence alluded to above is not committed, but rather if a man takes her gently by the hand because he thereby suggests that she is willing to proceed further with him. If so, a parallel is to be found to this idea in Muller's explanation of the ancient form of capture in marriage, given in his work on the Dorians,(b) viz., as indicating the feeling that a young woman "could not surrender her freedom and virgin purity unless compelled by the violence of the stronger sex," a theory rejected somewhat summarily and arbitrarily by McLennan on the ground that savages do not display such delicacy of feeling. Ourselves we are inclined to think that there is much in the view that this was the origin of the idea, and survivals of it are to be found in modern times in cases of elopement or abduction where it is assumed that the woman does not consent: Modesty consists very much, in some instances, in the outward show of resistance.

To apply, however, the notion underlying the passage from Professor James' work, it would seem that it is not so much what the man does, as the man who does it, for it is the fact that the person is unfamiliar that arouses the feeling of shyness which is at the root of Modesty. In addition to this, the desire to stand well with others also alluded to increases the feeling when

(a) James, *ibid.*, p. 437.

(b) Bk. IV, Ch. IV, sec. 2, quoted

in J. F. McLennan's *Primitive Marriage*, p. 10, Edn., 1886.

anything is done or suggestion made in the presence of those who are respected, feared, or even entirely unknown, and so resentment is openly shown as a means of retaining their good opinion rather than as an expression of an outraged instinct.

This amounts to the somewhat cynical conclusion that if the person is well known to the woman and he does not do it in public, he is unlikely by his act to really commit the offence in question, and without going so far as to say that this is universally true, we believe it to be correct in a very large number of cases because if it is the circumstances which create the feeling, without the requisite circumstances it will not be found. For we doubt the existence of such a thing as Modesty in the abstract, it seems always to be relative to persons and circumstances of time and place. "Ethnology shows it to have very little backbone of its own, and to follow fashion and example," (a) while some Anthropologists as the result of their investigations deny its existence altogether in some countries. If, however, it may be said to exist in itself, it is probably entirely of a negative character: it would be a species of recoil from a purely animal act, which would arise as the ideal instincts are developed and would be stronger in those races which had progressed most in that path.

It has occurred to us to examine Surprise because of some statements on the subject made by Sir
 Surprise. Frederick Pollock in his work on contracts from which the following quotations are taken. "Another alleged ground of equitable relief against contracts founded on the notion of an inequality between the contracting parties has been, 'surprise,' or 'surprise and improvidence.' But this seems to be only a way of describing evidence of fraud or of a relation of dependence between the parties." (b)

"It is submitted, however, that there is no intelligible reason for treating 'surprise' or 'improvidence' as a substantive

(a) James, *op. cit.*, Vol. II, p. 436.

(b) Pollock on Contracts, p 633.

cause for setting aside contracts much less for attempting to give these words a technical signification. Both terms are in fact merely negative and relative. *Surprise* is nothing else than the want of mature deliberation: *improvidence* is nothing else than the want of that degree of vigilance which a man of ordinary prudence may be expected to use in guarding his own interest But if it be disputed whether there was or was not any real consent, or whether consent was or not freely given, then circumstances of what is called surprise or improvidence may be very material as evidence bearing on those issues.’’(a)

“ *Surprise and improvidence*, therefore, are matters from which it may be inferred, as a fact in particular cases, that there was no true consent, or that the consent was not free. But it is not to be affirmed as a general proposition of law that haste or imprudence can of itself be a sufficient cause for setting aside a contract, nor even that there is any particular degree of haste or imprudence, from which fundamental error, fraud or undue influence will be invariably presumed.’’(b)

Then after quoting a dictum that by Surprise, as a ground for setting aside a deed, is meant surprise accompanied with fraud and circumvention, he cites the law concerning inadequacy of consideration as analogous, and concludes:—‘Surprise’ or ‘improvidence’ represents nothing but an opinion of the general character of a transaction, founded on a precarious estimate of average human conduct, and cannot well have a greater legal effect than inadequacy of consideration, which generally admits of being determined by reference to the market-value of the object at the date of the contract.(c)

In the first place it must be noted that the author expressly disclaims any technical signification for the word ‘surprise’: it is therefore to be taken in its ordinary sense, and as such is

(a) Pollock on Contracts, p. 634.

(c) *Ibid.*, p. 636.

(b) *Ibid.*, p. 635.

apparently identified by him with 'haste,' if not also with 'improvidence,' and 'imprudence' is said to be merely a negative term and relative, *i.e.*, as we understand, it has only meaning when used with reference to the conception of deliberation. Now, of course with the aid of such arbitrary identifications and restrictions of meaning it is not difficult to arrive at the conclusion that it cannot itself be a sufficient cause for setting aside a contract: what we desire to maintain is simply that these restrictions are unwarrantable and the identifications are wrong. For whatever 'improvidence' may be, 'surprise' is not merely a negative term: neither is it simply an intellectual process, but is mainly, if not entirely, an emotion, and as such is both positive in character and has a disturbing influence on thought. A short psychological description will make clear what its true nature really is. Ribot describes it as spontaneous attention augmented. It is a shock produced by that which is new or unexpected, and belongs to the group of emotions. It is highly probable, he says, that in the state of surprise we have imperfect knowledge because we have too much sensation, (a) an instructive remark as showing that it involves not merely want of knowledge but also some positive cause of this. Professor Sully speaks of surprise as a feeling and one of the first emotions manifested by the child: he regards it as a mental shock or disturbance due to the sudden presentation of something for which attention is not prepared, and calling forth, as a secondary effect or re-action, an intensified attention, and says that it may readily oppose the process of understanding. He further calls attention to its diverting effects (b) which are well described by Professor Stout as a thwarting of attention and arresting of the course of mental activity. It is the initial stage of a mental process, and according as this process is or is not impeded, Surprise is regarded as pleasing or otherwise. (c)

(a) Ribot on Attention, p. 25.

(b) Sully, *op. cit.*, pp. 362-3, 87.

(c) Stout, *An : Psychology*, Vol. II, pp. 275-6.

Sir Frederick Pollock, as it appears to us, has not distinguished Surprise from the circumstances which cause it and to which it gives rise, and in any case has missed the fact that it is a feeling which as such disturbs the intellect. That it is necessarily relative to deliberation appears to be an unfounded assumption, want of mature deliberation being merely an effect which sometimes follows it when action is taken. So far as its nature goes, it would seem that, like either fraud or misrepresentation, it may have the effect of perverting the judgment, and, if so, may be a valid reason for setting aside a contract. We do not necessarily maintain that it should be such, but we do assert that the grounds advanced by Sir Frederick Pollock constitute no good reason why it should not.

5. As a mental state Imagination has been distinguished from others in the chapter on Memory, here
 Imagination, we desire to insist on its importance. There is, in our opinion, no other quality so valuable for aiding to discover the truth and estimate the probability of evidence, and this is pre-eminently so when the Judge has to act in a country and among a people so different from his own, as happens when he comes from England to the East.

To illustrate the importance of imagination in general we desire to quote at some length from a well-known writer : “ The great majority of uncharitable judgments in the world,” says the late Mr. Lecky, “ may be traced to a deficiency of imagination. The chief cause of sectarian animosity is the incapacity of most men to conceive hostile systems in the light in which they appear to their adherents, and to enter into the enthusiasm they inspire. The acquisition of this power of intellectual sympathy is a common accompaniment of a large and cultivated mind, and wherever it exists, it assuages the rancour of controversy. The severity of our judgment of criminals is also often excessive, because the imagination finds it more easy to realise an action than a state of mind. Any one can conceive a fit of drunkenness or a deed of violence, but few persons who are by nature very sober or very

calm can conceive the natural disposition that predisposes to it. A good man brought up among all the associations of virtue reads of some horrible crime, his imagination exhausts itself in depicting its circumstances and he then estimates the guilt of the criminal, by asking himself "How guilty should I be, were I to perpetrate such an act?" To realise with any adequacy the force of a passion we have never experienced, to conceive a type of character radically different from our own, above all, to form any just appreciation of the lawlessness and obtuseness of moral temperament inevitably generated by a vicious education, requires a power of imagination which is among the rarest of human endowments. Even in judging our own conduct, this feebleness of imagination is shewn, and an old man recalling the foolish actions, but having lost the power of realising the feelings of his youth, may be very unjust to his own past. . . . The further our analysis extends, and the more our realising faculties are cultivated, the more sensible we become of the influence of circumstances both upon character and upon opinions, and of the exaggerations of our first estimates of moral inequalities." (a)

Unfortunately, the study of the law is not one that cultivates the imaginative faculty, but is rather opposed to it, for it appeals to the logical faculty which induces a habit of regarding things as generalities and abstractions; it is the study of the 'humanities' which has been upheld on the ground that it cultivates imaginative insight into others' thoughts and mental experience generally. (b) [The basis of imagination is observation and reproduction, and "productive imagination consists merely in carrying out certain changes or modifications in that reflexion of our sense-experience which is supplied by the reproductive process." (c) It is at once a process of separation or subtraction, and of combination or addition.

(a) E. H. Lecky, *History of European Morals*, Vol. I, pp. 134-136.

p. 240.

(c) *Ibid.*, p. 224.

(b) Sully, *Outlines of Psychology*,

Now, it appears to us that the Judge who comes out from Home and never acquires any experience of the people by going among them and speaking with them must necessarily be deficient in the power of imagination, be his natural qualities what they may. This will be so because of his lack of experience, for *Imagination limited by experience.* 'all imaginative activity is limited by experience,' and since production is merely an elaboration of presentative material, there can be no such thing as a perfectly new creation.^(a) "The modes of connexion of our experience necessarily reflect themselves in all our imaginative picturings. Thus, it is obvious that all production makes use of those forms of combination which seem inseparable from our experience, *viz.*, the order of space and time other illustrations of this reflexion of the connexions of our actual sense-experience are seen in our habitual picturing of things as concrete wholes resembling those we know through our senses, of the movements of objects as continuous from one point of space to another and so forth." "There is no production without reproduction. In trying to realise a scene described by a traveller or a poet, I am wholly dependent on the revival of past experiences of my own."^(b) "Each individual can only represent to himself the thought, perceptions, emotions, desires, volitions, &c., of his fellows by reference to his own subjective experiences. He must interpret the manifestations of their mental life by conceptual analysis and reconstruction of the material supplied by his own mental life."^(c) This is true in general: in order, however, to fully profit by experience when dealing with people of another race, he must go further and actually search in his own mental life for analogies which will enable him to construct in imagination the different mental life of those around him. How this may be done has been explained by Professor Stout,^(d) who gives us

(a) Sully, *Outlines of Psychology*, p. 225.

(b) *Ibid.*, p. 227.

(c) Stout. *Groundwork of Psycho-*

logy, p. 165.

(d) Stout, *Manual of Psychology*, pp 21-22.

an example of the wide-spread belief among savages in the powers of all kinds of odds and ends to influence the fortunes of the persons possessing them. Now, to realise how such a belief will influence their thoughts and actions, the European must reflect on moments in which he has found himself influenced or has felt strongly inclined to be influenced by considerations in themselves as meaningless or irrelevant as those on which the savage relies, *e. g.*, the fall of a picture, the presence of thirteen at a table, the change of seats or cards at the gambling table. He must then attempt to represent a mind in which tendencies, that in him are so overborne by other conditions as to be transient and occasional, are unchecked by opposing forces, and for that reason prominent and permanent. If he can succeed in doing this, actions which would otherwise appear to him extraordinary and motiveless, will be explained and seem natural, while if through want of imagination he fails to do it, he will needlessly suspect everything that is told him, and will be forced to account for every event by supposing some deep motive which has not come to light. His conclusion will usually be that he has not got to the bottom of the matter and that it is not safe (in a criminal case) to convict the accused, who will thus be acquitted not because he is believed to be innocent, but because the Judge is unable to account to himself on European principles for the actions of men who are Asiatics.

6. If imagination is the most important quality, prejudice is perhaps the worst impediment. Psychologically speaking, it is a case of mental pre-adaptation which may be voluntary or involuntary, and is a source of active illusions. “If a wrong mental image,” says Professor Sully, “happens to have been formed and vividly entertained, and if the actual impression fits in to a certain extent with this independently-formed preperception, we may have a fusion of the two which exactly simulates the form of a complete percept,” *e. g.*, we expect to see a certain person, some one like him comes, and we then err in taking him

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for the man we expect. Physiologically, owing to a partial identity in the nervous processes involved in the anticipatory image and the impression, the two tend to run one into the other, constituting one continuous process.(a)

The capricious selection of the interpretations we put on objects is limited not only by the character of the impression of the time, but also by the mental habits of the spectator. His fancy runs in certain definite directions and takes certain habitual forms: the whole past mental life and ruling emotions give a particular colour to new impressions and so favour illusion. "There is a 'personal equation' in perception as in belief—an amount of erroneous deviation from the common average view of external things, which is the outcome of individual temperament and habits of mind."(b).

For good observation what is chiefly needed is self-restraint, in order to limit the attention to what is actually presented and exclude all irrelevant imaginative activity. The common faults of the bad observer are the impulse to go beyond the facts observed and stray into inference and to look out beforehand for a particular thing and so create a prepossession. The undisciplined mind is apt to see what it expects, wishes, or, may be, fears to see, and to overlook that which it is disinclined to believe.(c) It often happens in consequence that a witness states things which appear to the more educated mind of the Magistrate to be manifestly false or absurd and who is therefore inclined to reject the whole: but such an attitude is more frequently than not a wrong one. An effort should be made to arrive at what the witness actually saw apart from the explanations he gives of them, for it is usually the tacit explanations which are wrong. Especially is this so if there is any tincture of superstition about the narrative. It is now known that many of the marvellous tales about witchcraft, magic, the evil eye, &c., which were prevalent in England more than a century ago, were really based on facts, but the wrong

(a) Sully, *Illusions*, p. 94.

(b) *Ibid.*, p. 101.

(c) Sully, *Outlines of Psychology*, p. 165.

interpretation of them led to the whole statement being discredited, and it is only on a re-examination of them in the light of later knowledge that we are now able to perceive the substratum of truth which underlay them.

If it be objected that such witnesses must be necessarily false ones because of the untrue explanations which they invent, we cannot admit that they are guilty of anything more than mere mistakes, and these have arisen from the fact that they are dealing with events where the essential conditions have not fallen within their practical experience. When the operative conditions are in the main beyond the control or even beyond the ken of the uncultured mind, ideal construction cannot fix upon what is essential: and since the strength of the practical interests concerned demands the discovery of some operative conditions to form a basis of practical procedure, causal efficacy is ascribed to all kinds of circumstances which are in reality totally irrelevant.(a)

The extent to which prejudice prevails in observation is readily admitted, but it is not sufficiently recognised that what is true of ordinary perception is similarly true of conception and thought. It is a well-known mental law that a state of things is naturally interpreted by help of more common and familiar relations, and so error arises, especially in a strange country. It is particularly the man who comes out late in life from England who is handicapped in this way, inasmuch as his standards are more formed in one direction: as Dr. Carpenter says "our nervous system grows to the modes in which it has been exercised," and the same is true of our mental life. This kind of prejudice is due to Habit, which will be discussed below; the other aspect is the influence of Feeling on ideas which Professor Höffding explains as follows:—

"But the feeling itself may have a hindering effect. If the feeling is very closely intergrown with the idea it will

(a) Stout, *Manual of Psychology*, p. 521.

interfere with the natural union between a and a_2, a_3, \dots and still more that between a and b —that is to say, the line of thought is not brought to its full conclusion, because the feeling will not expand beyond its original object. Here operates the inertia of feelings, which in this way becomes a source of many inconsistencies in history and in daily life The fact that a certain idea or set of ideas, has as a basis strong interests or violent emotion alters its relation to other ideas. It becomes a stronger centre of association than it would otherwise be. In all experiences regard is paid only to that which in some way or other affects the idea supported and strengthened by the interest. All the other elements in the world do not exist for consciousness. Feeling effects here a qualitative choice. All ideas which do not harmonize with the ruling feeling are suppressed, just as forms of life disappear which are unable to adapt themselves to their circumstances.”(a)

We can trace in many ways the effect of prejudice of this kind which has its basis in feeling. It is commonly remarked that a judge or magistrate who is married nearly always takes a more severe view of an offence committed on a woman, which is easily accounted for when we recollect the influence of feeling on ideas and the fact that our feelings practically depend on our interests, which in the case of the married man are centred on woman. For to be truly impartial we require not merely the rare power of vividly representing the affairs of others to ourselves—which depends on the imagination—but also the counter-power of abstraction from the vividness with which things known as intimately as our possessions and performances appeal to our imagination.(b) Only so can we see our own affairs in their true light and estimate what concerns ourselves at its true importance, and it is the fact that so few persons possess this power that is the ground of the legal maxim that no man shall be judge of his own case.

(a) Höffding, *Outlines of Psychology*, pp. 298-9.

(b) James, *op. cit.*, Vol. I, p. 328.

8. It was said above that one form of prejudice is due to habit, by which remark it was not intended to disparage the utility of habit in many respects, for it is only when habit is without sufficient justification that it becomes prejudice and an obstacle to the reception of new truths. Professor Stout gives as an instance of such prejudice the deeply-rooted habit of certain modern biologists, who explain the origin of the characters of living organisms exclusively by natural selection. This mental tendency, he says, has become automatic with them : but in the special occasions in which it comes into play a special exercise of ingenuity is required in bringing the general principle to bear on the particular case.(a)

These words, it appears to us, might equally well have been written of the legal profession : for it is the habit of the legal mind to try and force legal principles and ideas which have applied to some cases in the past on whatever facts may now arise regardless of whether they fit or not. Through perpetually looking backwards our lawyers have developed a mental tendency which prevents them looking forward : exclusive regard to precedents and decisions has rendered a certain species of thinking—if thinking it may be called—automatic with them, and the ingenuity which they display in bringing their legal maxims to bear on the particular case only serves to make them the more inaccessible to new ideas. They live in an artificial world of their own apparently oblivious of the fact, which, if it were not for the harm it often does to the persons and property of individuals, would be as amusing to the outside person as are their attempts to square their decisions with their principles, attempts which remind one of nothing so much as the endeavours of the old mathematicians to square the circle. Nor is this result to be wondered at when they steadfastly refuse to consider as possibly correct any reason which clashes with past views, or to even conceive of any country or

(a) Stout, *Analytical Psychology*, Vol. I, p. 262.

circumstances in which their precedents may not apply : the old decisions must therefore be repeated, and the oftener they are repeated the greater the habit must become. ("One necessary and omnipresent condition of the formation of habit is the tendency of any mental process with its connected movements to repeat itself simply because it has occurred before—a tendency which grows stronger the more frequently the process recurs. When we say that the tendency grows stronger we mean: (1) that the process is capable of being set in action by a slighter cue, (2) that it becomes less liable to disturbance from accompanying circumstances, (3) that it becomes stronger as a propensity, *i.e.*, if its course is interrupted or arrested greater impatience is felt. This principle of repetition seems in certain exceptional cases to be of itself sufficient to account for the growth of habit."(*a*)

For ourselves we cannot admire the type of intelligence which consists merely in subsuming cases under a limited number of fixed principles nor do we appreciate the legal habit, or, as (*b*) Best terms it, the legal instinct. We are rather reminded of the words of Darwin "there seems even to exist some relation between a low degree of intelligence and a strong tendency to the formation of fixed, though not inherited habits; for as a sagacious physician remarked to me, persons who are slightly imbecile tend to act in everything by routine or habit; and they are rendered much happier if this is encouraged."(*c*) There can be no question that the ordinary judge is rendered much happier if he can find a precedent to quote than if he has to attempt any dialectic of his own, and the aim of most pleaders appears to be to rain down on the judge as many High Court decisions as possible, so that the argument often becomes rather a discussion as to the meaning of some precedent twenty years old than a review of what concerns the case under trial.

(*a*) Stout, *Analytical Psychology*,
Vol. I, p. 263.

(*b*) Best on Evidence, § 91.

(*c*) Darwin, *Descent of Man*, Edn.,
1891, Vol. I, p. 103.

9. The chief value of habit is that it enables us to do so much mechanically and without thought and so liberates mental power for other things, and it must not be supposed that, because we have laid stress on the mischief it may do, we do not recognise its obvious utility. But we have now to consider a presumption in law which is in reality based on habit though it is not usually described as such: it is generally represented as an application of the more general presumption that things remain in their original state, an assertion which, as we have occasion to remark in the chapter on Insanity, is without foundation. (a) It will be convenient to quote some of the statements of writers on Evidence on the point.

"Various *primâ facie* legal presumptions," says Taylor, "are founded on the continuance or immutability, for a longer or shorter period, of human affairs, which experience tells us usually occurs. For instance, when the existence of a person or personal relation, or a state of things, is once proved, the law presumes that the person, relation or state of things continues to exist till the contrary is shown, or till a different presumption is raised, from the nature of the subject. It is also presumed, till the contrary appears, that opinions which individuals once entertained and expressed, and that a state of mind on their part once proved to exist, remain unchanged." (b)

Again Phipson writes "states of persons, mind, or things, at a given time, may in some cases be proved by showing their previous existence in the same state; there being a probability (weakened with remoteness of time) that certain conditions and relationships continue, *e. g.*, human life, marriage, sanity, opinions, title, partnership, official character, domicile." (c)

As in the case of insanity, Ameer Ali and Woodroffe quote the presumption as follows: "When the existence of a personal relation

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 779.

(c) Phipson, Evidence, 48, 2nd Ed., 96.

(b) Taylor on Evidence, §§ 196, 197.

or state of things *continuous in its nature* is once established by proof, the law presumes that such status continues to exist as before, etc.” : here as there, we ask, where is the presumption ? The addition of the words ‘continuous in its nature’ makes it a mere tautology : if that be known, the same thing is simply affirmed again, and there is no inference or presumption drawn.

However, what we are now chiefly concerned with is the narrower application of this wide presumption to character and opinions. The same authors say “the character and habits of a person is presumed to continue as proved to be at a time past. So, in an American case (*Sleeper v. Van Middlesworth*, 4 Denio, 431 Amer.), it was attempted to impeach the character of P, a witness. A and B who knew P four years before when he resided at another place testify that his character was then bad. It was held that the presumption was that P’s character remained the same.”(a)

What we desire to point out is that the mental law is one of change and not of continuance, and that it is a mistake therefore to attempt to apply such a presumption here. We are compelled to attribute continuity, to a certain limited extent, to the physical sequences of nature because they have no purpose in view that we can understand, and in order to render our world intelligible to us, but not because there is anything in their existence *per se* that warrants the presumption. In the sphere of men’s opinions and character there is no such necessity, for they are equally intelligible on the assumption that they change from time to time : indeed, there is nothing that a man changes more easily than his opinions. If there is any validity in the presumption that, because a man held certain opinions or was of a certain character four years ago, he does so now or is now of the same character, it is due not to continuance but to repetition, that is habit. It is because the opinions have been reinforced by frequently thinking in the same way and a mental disposition has thus been formed that we find them now,

(a) Ameer Ali and Woodroffe, *op. cit.*, p. 782.

not the same, but of the same kind only stronger and more fixed, for that is the legitimate conclusion. When, however, a man's habitual disposition is spoken of, it must, as Mr. Bradley says,^(a) be taken to include his environment as well as his internal feelings, etc., you cannot separate him from his surroundings and assume they have no influence on him nor can you truly say that if the surroundings change, the individual will remain the same. But how rarely is it that the environment does not alter.

Again, a man is influenced consciously or unconsciously by his past, which is not a constant quantity but ever changes. It is perhaps truer of morality than of intellectual opinions that persons remain the same, for we know cases of men who, owing to their morality by force of their habitual conduct act against what are their real opinions; but here also, as in the sphere of opinion, so much depends on age, surrounding circumstances, change of circumstances and the like, that the value of the presumption appears to be so slight as hardly to be worth the quoting. That character remains the same would seem to be truer of some races than others: among the Burmans it is notorious that a man may be good one year and bad the next to an extent which one hardly experiences in European countries. This is doubtless only one of the results of different education and surroundings and serves to show how little they can be neglected in estimation of character and its changes. For the character depends on the habituated self and the conditions we meet with, and as neither does this self cover our whole nature nor can we exhaust all the conditions with which we may meet, there is always the possibility of a change in character and some fresh act. It is only part of the facts which is covered by 'same character and stimulus, same act.' The self no doubt, especially as we grow older, becomes more and more determined and so tends to exclude more possibilities, and external conditions may become more or less permanent: but this is not enough. This fixedness is only

(a) Bradley, *Appearance and Reality*, pp. 78-9.

relative, because we cannot exhaust all possible external conditions and we can never systematize the whole self.(a)

10. It is enacted in s. 55 of the Indian Evidence Act that 'character' includes both reputation and disposition, but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown. In English law, however, character is confined to reputation only, and by reputation is meant what is thought of a person by others and is constituted by public opinion: at least this was the decision in *R. v Rowton*, though the case is said not to be acted on in practice.(b) Best gives the effect of the case as follows:—"The enquiry should be as to his *general* character among those who have known him, with a view of showing that his *general* reputation for honesty is such as to render unlikely the conduct imputed to him, and even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused, is inadmissible."(c)

The legal use of the term 'character' evidently differs considerably from the ordinary acceptance, at all events in English law, for not only is it regarded as equivalent to reputation, but it was also said in the case of *R. v. Wood*, "the question is not whether the prisoner was *guilty* of that robbery, but whether he was *suspected* of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one."(d) The Indian legislature have come nearer to the popular meaning by including disposition, which is evidently a step in the right direction, if only for the reason given by Sir James Stephen that "the question always put to a witness to character is, what is the prisoner's character for honesty, morality, or humanity? as the case

(a) Bradley, *Ethical Studies*, pp. 48, p. 425.

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(c) Best on Evidence, § 260.

(b) Ameer Ali and Woodroffe, *op. cit.*, (d) *Ibid.*, § 261.

may be" . . . and "it would be no easy matter to make the common run of witnesses understand the distinction between reputation and character."(a) "Disposition," it is said, "comprehends the springs of motives and actions, is permanent and settled, and respects the whole frame and texture of the mind. When a man swears that another has a good character in this sense he gives the result of his own personal experience and observation, or his own individual opinion of the prisoner's character as is done by a master who is asked by another for the character of his servant."(b)

We do not desire to refine too much over psychological terms, but we must remark that this description of disposition appears to us to include too much: disposition is what we have referred to above as the self and should not be said to comprehend in itself the springs and motives of action to the entire exclusion of the environment which supplies the stimulus that acts on the self. We have explained that it is partly because we cannot exhaust all the external conditions under which a man may have to act that we cannot speak with certainty as to his character remaining the same. The commentators then proceed to say that there are therefore two different questions which can be asked, *viz.*, what was the general reputation of the accused for honesty? and, was the accused generally of an honest disposition? and the witness will answer the first from what was generally known about the accused in the neighbourhood where he lived, and the second from his own special knowledge of the accused. But in either case evidence may be given only of *general* reputation and *general* disposition. "Both lie in the general habit of the man rather than in particular acts or manifestations. Where evidence of character is offered, it must be confined to general character; evidence of particular acts, as of honesty, benevolence or the like are not receivable."(c)

(a) Stephen, Digest of the Law of Evidence, p. 187. p. 425.

(c) *Ibid.*, p. 426.

(b) Ameer Ali and Woodroffe, *op. cit.*,

There appears to us to be something unsatisfactory about this evidence of character, which in reality springs from a confusion between speaking generally or giving general evidence and giving evidence as to a general matter as distinguished from a particular fact. When a witness speaks to reputation, disguise it by what terminology you will, he is speaking merely to rumour ; he is neither stating what he has himself seen or heard nor yet necessarily giving his own inference from any facts, he may be merely repeating the inferences of others from he knows not what facts, if indeed they are based on any facts. This has already been remarked on by Mr. Mayne : “ A witness to character who begins, as he always does begin, by giving his own opinion, is stopped, and told that he must only say what character the accused bore among those who were acquainted with him generally. The curious result follows, that a witness is not allowed to describe a man’s character from his own personal knowledge and experience, but is required to say what people in general think of him, of which he can know little or nothing.’(a) Further when it is said that this evidence must be as to *general* reputation, we must confess that we do not know how such evidence can be given. As Sir James Stephen says (*vide supra*), the question asked must be, what is the prisoner’s character for honesty, morality or humanity ? as the case may be : that is to say, you must define your question in some respects just as in comparison you must compare two persons or things in respect of some one quality. To say that a man is good or bad simply does not meet the case : good and bad are relative terms and are indefinite and must be defined for the purpose of the case in hand, and this the commentators themselves seem to admit when they frame the question, ‘ what was the general reputation of the accused *for honesty* ’ ? The last two words in part specialize the case. We must submit,

Reasons for the unsatisfactory nature of character evidence.

(a) J. D. Mayne, Criminal Law of India, 2nd Ed., p. 1004.

however, that the question cannot be satisfactorily answered by repeating 'what was generally known about the accused in the neighbourhood where he lived,' unless by the words 'what was generally known' you are allowed to state particular facts, and then you will merely be stating facts on hearsay, at all events in most cases.

Now, as regards general disposition the same objection does not apply, because here the witness is allowed to speak 'from his own special knowledge of the accused.' This to our mind is the only legitimate kind of evidence as to character. It is true that it is said that evidence of particular acts, as of honesty, benevolence or the like are not receivable, which is, in our opinion, a mistake: it is objected that most villains could prove some occasion on which they have acted with humanity, fairness or honour, but why should they not have the credit of this and their character be estimated according to the balance of their actions proved? However, we do not desire to delay over this: a witness's general impression of a man is founded on his own observations, it has a basis of fact, and is a definite matter. In the section on comparison of handwriting we have quoted a passage in which Professor James well describes how such a general impression is created as the impulsive result of a summation of stimuli: reasons are not given for it, but it is felt, and it cannot be analysed and remain the same.(a) This is the real objection to expecting a witness to give definite instances on which it is founded, but, if he can do so, we think he should be allowed, and we do not see how otherwise there is any way of testing the statement of a malevolent witness. This kind of evidence is a very different thing from speaking generally, though it does speak to a general or total result.

(a) James, *op. cit.*, Vol. II, pp. 350-1 Note.

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CHAPTER X.

INSANITY.

General features of insanity—interpretation of insanity in the Indian Criminal law—separation of the cognitive faculties from the emotions and the will—such separation fallacious and opposed to the true inter-connection of psychical states—preponderating influence of the emotions in the total state of consciousness—Delusions as a mark of madness—their explanation—argument from the nature of experience—recapitulation. Insane impulses—the medical and psychological view of the existence of such impulses—Mr. J. D. Mayne's view of insanity—Criticism of it—the burden of proof in cases of insanity—analogy drawn from hypnotic patients.

THE importance of insanity in law is manifold : it raises the question whether a criminal is to be held responsible or not for some lawless act, whether a witness is competent to give evidence, whether a party is qualified to contract, whether a partnership or agency is terminated, and other similar points. As it is usual to go to mental pathology for assistance in the matter and to call in medical men as expert witnesses, it may be doubted at first whether it is any concern of psychology : but the psychologist knows otherwise, for he has gained some of his most important results by a study of abnormal states of mind, one of which, *viz.*, the hypnotic has been left very largely to him. Such treatment of the subject however as we shall give will not be found to trespass much on the province of medicine, both because we are unqualified for such a task and because psychology is naturally inclined to confine itself as far as possible to the psychical standpoint though this may sometimes include an appeal to physiology.

At the outset some general features of insanity will be noted.

General features of
insanity.

“The effect of mental disease is in general to substitute for the complex balanced system of psychical forces which we have in

health, a comparatively simple state of things in which certain tendencies grow abnormally strong and predominant through the suppression of others. More particularly, the higher and later acquired forms of psychosis, regulative processes of ideation, and self-control generally, tend to be dissolved, leaving the earlier and more instinctive tendencies uncontrolled. Thus through the weakening of the regulative volitional factor the patient is unable to control his ideas, and his intelligence is wrecked: or he becomes a prey to unregulated emotion, as where overweening conceit, timidity or animosity becomes predominant, and helps to maintain corresponding mental illusions." (a)

We draw attention to the fact, for reasons that will appear later, that stress is here laid on the weakening of the volitional factor, and this feature again appears as the explanation of the crowd of associations of ideas which run riot in the insane mind. "If there is any single criterion of mental derangement," says Wundt, "it is this—that logical thought and the voluntary activity of the constructive imagination give way to the incoherent play of multifarious associations." He attributes the purposeless vacillation of the insane and the manner in which they express their thoughts to a lack of voluntary control over the unruly associations, and says that it is in this very mobility of association that the germ of decay is to be looked for.

Another feature is the defective concentration of the attention which arises from the liability of the intellectual processes to be continually interrupted by sudden associations. (b) It is because the acts of the insane are regarded as to some extent involuntary that the doer is not held responsible for them, that is to say, the basis of responsibility is voluntary action. Hence Mr. Bradley's pertinent observation on Dr. Maudsley's book 'Responsibility in mental disease': "How in the world is it possible to say what relieves a madman of responsibility unless you know what

(a) Sully, *Outlines of Psychology*,
p. 468.

(b) Wundt, *Human and Animal Psychology*, pp. 317-321.

makes a sane man responsible? Unless a man is agreed with us as to our main beliefs as to a sane man's responsibility, how can we receive his evidence as to any one's non-responsibility?" (a)

The conception of responsibility will be found fully analysed in a later chapter: here we confine ourselves to discussing one side of the legal aspect of it, *viz.*, that connected with insanity.

2. It is stated in s. 84 of the Indian Penal Code that "nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Interpretation of
meaning of insa-
nity in the Indian
criminal law.

We desire to quote an instance of the way in which this has been interpreted by an Indian High Court. In the case of *Queen-Empress v. Kader Nasyer Shah*, I. L. R., 23 Cal., 604, on p. 608 will be found the following expression of the judges' view:—

"We learn, however, from medical and legal authorities" (here they quote three authorities) "who have considered the subject of responsibility in *mental* disease that insanity affects not only the cognitive faculties of the mind which guide our actions, but also our emotions which prompt our actions, and the will by which our actions are performed. It may be that our law, like the law of England, limits non-liability only to those cases in which insanity affects the cognitive faculties; because it is thought that those are the cases to which the exemption rightly applies, and the cases, in which insanity affects only the emotions and the will, subjecting the offender to impulses, whilst it leaves the cognitive faculties unimpaired, have been left outside the exception, because it has been thought that the object of the criminal law is to make people control their insane as well as their sane impulses, or to use the words of Lord Justice Bramwell in *Reg. v. Humphreys*. . . 'to guard against mischievous propensities and homicidal impulses.' Whether this is the proper view to take of

(a) F. H. Bradley, *Ethical Studies*, p. 44, note 1.

the matter, or whether the exemption ought to be extended as well to the cases in which insanity affects the emotions and the will as to those in which it affects the cognitive faculties, is a question which it is not for us here to consider. There are no doubt eminent authorities who are in favour of extending the exemption to those cases, but our duty is to administer the law as we find it. It might be said of our law as it has been said of the law of England by Sir J. Stephen. . . . that even as it stands the law extends the exemption as well to cases where insanity affects the offender's will and emotions as to those where it affects his cognitive faculties, because where the will and emotions are affected by the offender being subjected to insane impulses, it is difficult to say that his cognitive faculties are not affected. In extreme cases that may be true ; but we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. To take such a view as this would be to go against the plain language of s. 84 of the Indian Penal Code and the received interpretation of that section."

In both this case and also that of *Queen-Empress v. Lakshman Dagdu* (a) the judges found the accused guilty of murder and sentenced him to transportation for life, and then sent the cases to the Local Government with a recommendation that the Government be moved to take them into consideration and grant reduction of sentence or pardon. In the Calcutta case they added that the accused was suffering from mental derangement of some sort and was therefore entitled to every indulgent consideration.

We cannot ourselves either sympathise with or in fact understand the attitude of mind of the person who at the same time says 'guilty' and 'let him off.' It appears to us to be merely an

(a) I. L. R., 10 Bom., 512.

indication of the fact that the judges in question really believed their interpretation of the law on the point of insanity to be one that was not in accord with the facts : in other words that it pronounced a man not to be of unsound mind who was in fact insane. From their course of action alone it would seem to be clear that either the law needs amendment or that the judges' interpretation of it was wrong, and the fact that it was the received interpretation of it does not in the least prove it to have been correct. With the progress of knowledge it is necessary to revise our conclusions from time to time, and this is eminently a case in which the psychologist and the physician are ahead of the lawyer, and the lawyer himself is beginning to suspect it, as was shown by the halting language of these judges though they nevertheless obstinately adhered to their own traditions.

3. Our purpose is to show that this separation of the so-called cognitive faculties from the emotions and the will, and the consequent assumption that the one can be affected without influencing the other is opposed to the conclusions of psychology, biology and metaphysics.

The fallacy into which the judges have fallen is well known to the psychologist under the title of 'Faculty-Psychology,' and it will be necessary to briefly show what this is. It is quite legitimate for the purposes of classification or clearness of treatment to divide up the mind or consciousness into different processes, such as cognition, emotion, will, etc. ; but it is entirely erroneous to postulate certain entities corresponding to these processes and regard them as existing apart from one another and acting in different manners on different parts of the body or mind, or as each producing certain manifestations.

When for example the judges speak of "the cognitive faculties of the mind which guide our actions, our emotions which prompt our actions, and the will by which our actions are performed," they are both making a division of consciousness which

is psychologically untrue and also are attempting to explain knowledge, emotions and will by causes which do not exist.

Knowledge is not an effect or resulting product of cognitive faculties, neither are emotions the result of a feeling faculty nor yet are volitions produced by a faculty called will. To assign such explanations is merely to assert the same thing over again in different words. "To say," says Prof. Stout, "that an individual mind possesses a certain faculty is merely to say that it is capable of certain states or processes. To assign the faculty as a cause, or as a real condition of the states or processes, is evidently to explain in a circle, or in other words it is a mere failure to explain at all. Thus, it is futile to say that a particular voluntary decision is due to will as a faculty. . . . We explain nothing, by asserting that certain mental processes in man have their source in the faculty of Reason," etc.(a) Similarly Prof. Alexander speaks of our inveterate habit of imagining that there is such a thing as will in general: "We think of will as a kind of fixed machinery and on the other side of certain objects supplied to it, and we imagine the will as taking up its objects in turn. But will is nothing but a common name given to certain modes called volition in which the mind behaves under certain circumstances and every volition is distinguished from every other by the nature of its object."(b) In like manner Wundt condemns the abstract concept of a will which is transcendental and absolutely distinct from actual psychical volitions.(c)

The reader may think perhaps that this is merely a question of verbal expression, but we assure him it is not so. In the case before us it is clear that the belief held by the judges that there are such things as cognitive faculties which are the causes of knowledge, led them to the conclusion that, if these were unimpaired, the accused must have a mental capacity for knowing the nature of his act. A truer view of the inter-connection of

(a) Stout, *Manual of Psychology*, pp. 114-5.

Progress, p. 39.

(b) S. Alexander, *Moral Order and*

(c) Wundt *Outlines of Psychology*, p. 205.

mental processes and of the unity of consciousness would have saved them from such errors, as will now be demonstrated.

The total state of consciousness at any moment combines usually, if not always, several ways in which we are related to an object: we are aware of it (knowing), we are pleased or displeased with it (feeling) and we experience a tendency to alter or transform it by bringing it more fully into consciousness or the reverse (conation). These states are not distinct ones but partial constituents of one whole. Through the conative process we come to discover the nature of the object and thus conation and cognition are essentially connected: they are in fact different aspects of one and the same process. Cognition gives it its determinate character but without conation there would be no process at all to have a character.(a)

To exhibit the same inter-relation in different language: people speak of the ego, the self, the personality, &c., which are terms primarily intended to express the inter-connection of all psychical experiences of the individual. Now if we ask of what this personality consists, we find that it is an aggregate in part of the states and actions that constitute in each of us the feeling of the body and the routine of life, and in part of sensations, ideas, images, memory, instincts, tendencies, desires representing the habitual medium in which we live. But these are organised states, solidly connected and mutually awakening one another. We then go on to ask what is the bond that connects them? and the answer is, the organism: it is this which binds one state of consciousness with another, though what reaches consciousness is little compared with what lies buried below, albeit still active.

Nevertheless both the feelings, desires, passions as well as the highest intellectual manifestations have their roots in the organism.(b)

(a) See Stout, *op. cit.* pp. 57. *et seq.*, 599.

(b) Ribot, *Diseases of Personality*, pp. 51, 68, 82, etc.

4. Let us now consider which of these psychical elements has the preponderating influence in the constitution of the personality, in order that we may see whether there are grounds for the belief, that the question whether a man is *compos sui* or not depends on his cognitive processes and is not connected with the state of his feelings and volition.

Preponderating influence of the Emotions in the total state of consciousness.

"Ideas," says Ribot, "are a secondary factor only in the constitutions and alterations of the personality. The idea plays its part, but it is not a preponderating one. These results are in accord with what psychology has long taught, namely that ideas have an objective character. Hence they cannot express the individual as his desires, sentiments and passions do."(a)

Again Wundt writes:—"In the combinations of ideas and feelings which we call motives, the final weight of importance in preparing for the act of will belongs to the feelings, that is the impelling feelings rather than to the ideas. This follows from the very fact that feelings are integral components of the volitional process itself, while the ideas are of influence only indirectly through their connection with the feelings. The assumption that a volition may arise from pure intellectual considerations, or that a decision may appear which is opposed to the inclinations expressed in the feelings, is a psychological contradiction in itself."(b)

We call attention to this last sentence for it appears to us that the assumption condemned here is just the one made by the judges in the case referred to above, that is to say, they assume that though the emotions or the will may be affected it is still possible for a decision to appear opposed to such inclination, in virtue of the fact that the cognitive faculties are still unimpaired, or in other words, from pure intellectual considerations. This assumption which is their ground for holding the man to be responsible for his act is thus declared by Wundt to be a psychological contradiction in itself and he further adds that it springs from the false

(a) Ribot, *op. cit.*, pp. 124-5.

(b) Wundt, *op. cit.*, pp. 204-5.

assumption of the existence of a will distinct from actual psychical volitions.

And again : "intellectual processes can indeed never do away with emotions : such processes are, on the contrary, in many cases the sources of new and characteristic emotions . . . still intellectual development exercises beyond a doubt a moderating influence on emotions."(a)

We would also refer to our remarks elsewhere in this volume on the influence of emotion on the intellect, and to the fact demonstrated by Ribot that a change in the sexual instincts or in the tendencies connected with nutrition, &c., will change the personality.(b) These tendencies depend directly on the organism and the emotional states are reducible to tendencies; [the conclusion therefore is, that, so far from it being immaterial to the question of insanity whether the emotions or the will have been affected or not, there is more reason to suppose that an alteration or perversion of them would change the personality, than that a destruction of the intellectual processes alone would have that result, inasmuch as the latter are not so immediately related to the basis of the personality itself. We have no doubt that such is really the case and that what are commonly known as derangements of the intellect are in fact based on and explicable as due to perversion of the emotions, and an argument to this effect will shortly be drawn from a consideration of the nature of experience itself.

5. Before, however, proceeding to consider the matter from the side of metaphysics we shall seek some further psychological testimony to the dependence of intellectual disturbances on

Delusions as a mark
of madness.

emotional ones.

It is not necessary to establish the existence of a delusion in order to prove that a man is insane, but it is very commonly

(a) *Ibid.*, p. 209.

Psychology of Attention, p. 108,

(b) Ribot, *op. cit.*, pp. 61, *et seq.* ; *et seq.*

considered that this is a mark of madness and intellectual aberration. Now such delusions depend on a profound change in the nature of personal experience, which makes the present discontinuous with the past, and these breaches of continuity are frequently due to nervous disorders. "In general," says Prof. Stout, "a change in the experiences connected with the body, and especially with organic sensation, seems to be an essential factor in the process. Sometimes the resulting illusion relates specially to the bodily self, and does not profoundly affect the continuity of personal existence in other respects. Thus a patient, whose bodily sensations have become abnormal will feel as if he were made of glass or butter, and come to suppose that he actually is composed of such materials. But when the illusion is not limited to the bodily self, but involves a transformation of the individual's whole idea of his life-history, the reason probably lies in profound alteration of emotional tone. Organic sensation is a highly important factor in emotional states; alteration in it may either produce or be attended by a general change of emotional attitude. But emotions are not merely specific modes of feeling; they also involve characteristic conative tendencies either in the way of expansive and aggressive activity, or of shrinking and aversion . . . they fasten on any object they can find. When they have not an object, they make one for themselves. . . . If the emotional moods due to pathological conditions are sufficiently profound, intense, and persistent, whole systems of ideas will arise in this way which may be quite discontinuous and discordant with the actual past experience of the subject."(a)

The writer then points out that emotional moods in human life commonly arise in connection with social situations, and so when they arise pathologically, the patient explains them by ideally representing corresponding relations between himself and his social environment. Thus come delusions, such as that he is being

(a) Stout, *op. cit.*, pp. 550-1.

persecuted, or has committed some great sin, if the emotional moods are in the nature of depression, or that he has boundless wealth or power. &c., if they are in the nature of exaltation.

Thus the existence of delusions is traced to ideal representations which the insane are forced to make in order to explain to themselves changes in their emotions, and such so-called derangements of the intellect would never have arisen at all but for some prior emotional affection. If space allowed, we could similarly illustrate how in the case of all illusions, and as believed by most psychologists to a lesser degree in the case of hallucinations, the explanation is always to be sought in some disturbance of the organic sensations and the reasons which the patient invents to himself to account for them.

It is surely, in the face of such facts, ridiculous to set up a separation between the cognitive faculties on the one side and the emotions and the will on the other, and affect to discover cases in which only the former or only the latter have been impaired. The essential inter-connection of these mental states, as illustrated by the results referred to above, makes it impossible that such a theory can be true. The more correct doctrine is summarized by Wundt, when pointing out the main psychical conditions for abnormal states, as follows:—"We may distinguish in general three kinds of such conditions. They may consist (1) in the abnormal character of the psychical *elements*, (2) in abnormalities in the way in which psychical *compounds* are constituted, and (3) in abnormalities in the way in which psychical compounds are *combined*. As a result of the intimate inter-connection of these different kinds of conditions it hardly ever happens that one of these three conditions is operative alone; all three usually unite. The abnormal character of the elements results in abnormalities of the compounds, and this in turn brings about changes in the general inter-connection of conscious processes."(a)

(a) Wundt, *op. cit.*, p. 298.

By 'psychical elements' it may be explained, Wundt, refers to sensations and simple feelings, and by 'psychical compounds' the combination into which these enter, including ideas, memories, composite feelings, emotions, volitions and the larger complexes in which these unite.

Argument from the
nature of experience.

6. We now propose to briefly exhibit this same inter-connection from the side of metaphysics.

"The function of the 'understanding' is the perception of agreements and differences and other derived logical relations between contents of experience." (a) The 'understanding' therefore, or, as the judges call it, 'the cognitive faculties' are concerned with 'experience,' and a short examination of the nature of the latter will be found to lead by another path to a conclusion similar to the psychological one.

"Experience," writes Dr. Ward, "cannot without mutilation be resolved into three departments, one cognitive or theoretical, one emotional and one practical. . . It is true that what we take and what we find we must take and find as it is given. But, on the other hand, it is also true that we do not take—or at least do not take up—what is uninteresting; nor do we find unless we seek, nor seek unless we find. . . . Regarding experience in this wise, as life, self-conservation, self-realisation, and taking *conation*, not *cognition as its central feature*, we must conclude, that it is not that 'content' of objects, which the subject cannot alter, that gives them their place in its experience, but their worth positive or negative, their goodness or badness as ends or means to life." (b)

And again the same author tells us that objects of experience are not primarily objects of knowledge, but objects of conation, *i.e.*, of appetite and aversion; that thinking is doing, and like all doing has a motive and an end, and that, however, much for

(a) Wundt, *op. cit.*, p. 294.

(b) J. Ward, *Naturalism and Agnosticism*, Vol. II, p. 133.

purposes of exposition we may abstract, we cannot separate intellection from volition.(a)

This view has been still further developed by a school of thinkers who have recently come into prominence, and to whom we have already had occasion to refer, *viz.*, the Pragmatists or Humanists. They hold that the concrete processes of thought as they occur in individual minds are indissolubly mixed up with feelings and emotions, desires and volitions, and that 'true' and 'real' are terms of value which have meaning only to a thought guided by purposes, interests, and ends. A single quotation from one of these writers, will suffice. "Pure intellection is not a fact in nature; it is a logical fiction which will not really answer even for the purposes of technical logic. In reality our knowing is driven and *guided* at every step by our subjective interests and preferences, our desires, our needs and our ends. These form the motive powers also of our intellectual life."(b)

Now this view of experience and knowledge seems to us to exactly hit the case of the man described in the words of the Indian Penal Code as 'incapable of knowing the nature of the act or that he is doing what is wrong.'

For if it is the goodness or badness of objects as ends to life that gives them their place in experience and they are primarily objects of appetite and aversion not of knowledge; and if our knowing is guided at every step by our preferences, our desires, and our needs, then it is clear that the nature of the act will appear to the doer in the light in which his desires and needs present it, and that that only will be 'wrong' for him which runs counter to such desires and ends. These latter depend on the emotions and the will, and therefore a perversion of these due to organic disease or other cause must entail a similar perversion of the intellect, *i.e.*, of the knowledge of right and wrong. Indeed this must be so when it is remembered that all morality is relative, and that right and wrong are terms that have a meaning

(a) J. Ward, *Naturalism and Agnosticism*, Vol. II, pp. 131, 139, 235. (b) F. C. S. Schiller, *Humanism*, p. 10.

only with reference to ends : there is no fixed standard of right and wrong of which all must have the knowledge, and it is idle to argue as if there were one. The law no doubt does its best to create one by prohibiting certain acts under certain penalties, but apart from the fact that the law is often unable to maintain that standard and departs from it either openly or tacitly by way of mitigation of penalties, such success as it actually does have is mainly due to its assumption that everyone knows the law, an assumption which is of course in reality very frequently false in individual cases.

Such an assumption would not be tolerated even for legal purposes if it were not that the legally wrong does in fact usually correspond to what most men hold to be morally wrong, and so it is natural that the standard of unsoundness of mind adopted in the Penal Code should refer to what is 'either wrong or contrary to law : ' for by 'wrong', as we have elsewhere shown, 'morally wrong' is here intended, and not merely what is wrong as forbidden by law.(a)

7. Let us now briefly gather up the results of this discussion.

Recapitulation.

There are no such things as cognitive faculties existing apart from the emotions and the will, nor can our cognitive processes be separated off from our emotional and volitional ones, except for the purposes of study and exposition.

These mental states are inter-connected and occur together in one total state of consciousness, and states of consciousness are bound together by the existence of the organism. All ultimately depend on that, but the emotional states do so more directly than the intellectual ones, and it is our emotions which have the preponderating influence in the whole psychical complex which represents the mind at any time. They guide the intellect and direct it, and the latter cannot make decisions in opposition to them on purely intellectual grounds. It follows from

(a) See Chap. XV. para. 3.

this that the emotions and the will cannot be affected without also affecting our cognition, and delusions, illusions, &c., and what are generally known as derangements of the intellect can be traced to, and in fact explained as, the products of perversion of the emotions and affection of the organic sensations. To refuse therefore to recognise affections of the emotions and the will as sufficient ground for allowing the benefit of the exemption contained in s. 84 of the Indian Penal Code is an unjustifiable restriction of that section, which is based on a false assumption of popular psychology and is entirely opposed to the truth of the case.

8. From what has preceded, the reader will have no doubt as to what our attitude is likely to be on the vexed question of 'insane impulses.' In the case cited above the judges held that a person is not entitled to exemption from criminal liability when it is only shown that he is subject to insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired. Sir James Stephen is of opinion that according to English law 'insane impulse' may be a sufficient defence, but Mr. J. D. Mayne dissents from this and clearly holds the view that both in the English and Indian Criminal law uncontrollable impulses are not recognised as proving madness in the sense the law requires.^(a) It appears to us that there are two ways of treating this question. The first is the one usually adopted, *viz.*, to argue as to the existence of such impulses, and as to the possibility of proving that they are really uncontrollable.

The second is based entirely on the considerations already set out in this chapter and relates really to the burden of proof in the matter. Briefly summed up, we may say, that as, for the reasons already given, the close inter-connection of the cognitive, emotional and volitional processes is established, if the affection of any one of them is proved it ought to be presumed that the

(a) J. D. Mayne, *Indian Criminal Law*, 3rd Edn., pp. 410, *et seq.*

others are also affected until those who assert the contrary prove their view to be correct.

As we have some remarks to make on both methods we shall devote some space to each.

Now in the first place it seems to us that if it is really accepted that there are such things as impulses which are truly uncontrollable then whatever may be the language or the intention of the law, the person who maintains that such a case is not a sufficient defence for a man charged with a crime, must simply be regarded as inhuman. In a barbarous state he might doubtless persuade the society in which he lived that it was demanded by their own interests, that a person afflicted with such impulses should be executed or punished for them, but he would convince no civilised people that they were justified in adopting such a penal code. At the most they would hold that such persons ought to be kept under restraint. To whom then should the question naturally be addressed whether there are such things as 'uncontrollable impulses'?

We should reply 'To the doctor and the psychologist.' Most

The medical view
concerning insane
impulses.

people would no doubt omit the latter owing to their ignorance about him, so let us pass him over for the present and appeal to the doctor. It is not proposed to write a medical treatise on insanity: we are quite content to take the results of those who have studied insanity medically as summed up in any leading work on medical jurisprudence. The following will suffice:—

“There is a general consensus of opinion among writers on insanity, 1st, that one effect of insanity may be a weakening of the affected individual's power of self-control; 2^{ndly}, that in some cases the power of self-control is totally lost, the result being the production of an uncontrollable impulse—i.e., an impulse which nothing short of mechanical restraint will control to do certain acts; and 3^{rdly}, that such weakening or total loss of the power of self-control may occur both in insanity accompanied by delusions and in insanity unaccompanied thereby.

The question therefore arises :—Suppose A to have killed B, and the only thing proved about A's insanity is that, by reason of insanity, A's power of self-control was, at the time he killed B, weakened or entirely lost, what would be the legal effect ? To this question it may be answered :—

1. That any weakening short of total loss of power of self-control would not entitle A to an acquittal, either under Indian or English law.

2. That according to Indian law, total loss of power of self-control would not entitle A to an acquittal, except the Court consider it proved that, by reason of such total loss, A at the time of doing the act was, in the words of the section, ' incapable of knowing the nature of the act, or that he was doing what is either wrong or contrary to law. '

3. As regards the law of England on this last point, Sir J. F. Stephen states that it is doubtful whether or not an act is a crime if done under the following circumstances : by a person suffering from mental disease, who at the time of doing the act was by such disease totally prevented from controlling his own conduct. "(a)

The reason why we have included that part of the quotation which refers to the legal effect will appear later : what we now desire to lay stress on is that according to ' a general consensus of opinion among writers on insanity ' (by which phrase we understand medical writers) uncontrollable impulses do exist. The result of our appeal to the doctors is therefore strongly in favour of the view that persons do sometimes commit crimes owing

View of psychology concerning insane impulses.

to impulses which are beyond their power to resist. The verdict of the psychologists is in accordance with that of the doctors.

Ribot speaks of the great group of irresistible impulsions which includes the ungovernable craving for drink, the unconquerable impulse to steal, to practise incendiarism, to kill, to

(a) Lyon's Medical Jurisprudence for India, 3rd Edn., by Waddell, p. 362.

commit suicide." He explains them physiologically as depraved tendencies due to degeneration of the organism : the conditions of their genesis are beneath consciousness, the results only of this unconscious work are known. (a)

The authors of *Animal Magnetism* similarly recognise them and state that the suggested impulse to persons in the hypnotic state resembles the irresistible impulse of insane persons in their anguish when they are restrained from accomplishing the act and their relief when it is accomplished. (b)

Prof. Stout quotes several cases and explains these impulses as sometimes due to imperfect powers of deliberation, the absence of inhibiting tendencies and sometimes to the positive strength of the impulsive idea which leads to action. There is a conflict, he says, between the self as a whole ranged on the side of the volition and the isolated impulse to action which derives its strength merely from the fixation of an idea by pathological conditions. The conation which resists the will arises primarily from the fixation of the idea in consciousness, which under pathological conditions does not arise from any desire for its object. Indeed the feeling towards the ideally represented object is sometimes that of intense aversion. (c)

Other psychologists could also be added to the list, but it is perhaps unnecessary to quote further.

9. It being established then by the joint evidence of the doctors and psychologists that 'uncontrollable' impulses exist, what is the reason why the lawyers refuse to recognise them and assert that they are insufficient to establish the legal plea of insanity ?

In reply to this we will quote Mr. Mayne's view of the matter in his own words. (a) "It is certainly

Mr. Mayne's view of legal insanity. 'conceivable that there might be a state of mental disease, which would deprive the

(a) Ribot, *Psychology of Attention*, pp. 108-111.

(b) Binet and Féré, *Animal Magnetism*, pp. 282, 292.

(c) Stout, *Manual of Psychology*, pp. 620-8.

(d) See *Criminal Law of India*, p. 412.

sufferer of all capacity to resist a particular impulse, while it left him the perception of the nature and consequences of the act to which he was impelled. The insuperable difficulty in the way of giving legal effect to such a defence would be, that it would be impossible to establish it. We can tell that a man has not resisted an impulse, but how can we tell that he could not have resisted it, or why he could not. It is a matter of every day experience that persons who are subject to no mental disease yield to apparently uncontrollable fits of passion, but we hang them all the more on that account. If a man who is mentally diseased acts in a similar way, how are we to know that his want of control is due to his mental disease, or that his mental disease did more than supply him with a motive for his act, while not depriving him of the power to refrain from it, if he had chosen? Even in a lunatic asylum some sort of discipline is maintained by pains and discomforts inflicted upon the patients, and they learn to exercise some self-restraint in order to avoid the infliction. If a case arose in which it appeared to be made out that mental disease had absolutely destroyed the capacity to govern the will, the case would probably fall under one or other of the two grounds of exemption stated in the Penal Code. If it did not, the conflict between law and mercy would have to be solved by the dispensing power of the executive not by the exempting power of the judge."

In the first place Mr. Mayne starts by admitting that it is merely conceivable that there might be such a thing as an uncontrollable impulse. On this we have to remark that he is either entirely ignorant of the results of the studies of the doctors and psychologists or else he deliberately either rejects or ignores them. Otherwise he would clearly have admitted the existence of such impulses in a less diffident manner. Not having this knowledge or else rejecting it, on what knowledge we would ask, does Mr. Mayne proceed to lay down the proposition that you cannot prove that an impulse was uncontrollable? As far as we can see he appears to think that he has proved his case by merely

asking a few helpless questions of a weakly sceptical nature. His argument simply amounts to asking 'how am I to know that of which I am totally ignorant?' The natural reply to such an interrogation would be 'by asking those who know'; in this case the doctors and the psychologists.

It appears to us that a parallel to Mr. Mayne's attitude in this matter would be that of a man who had never studied astronomy, who, on being told that there would be a meteoric shower over part of the British Isles on a calculated date, replies: 'I can't accept the statement, how do I know that it is not going to Kamschatka?' If Mr. Mayne is acquainted with the conclusions of medical and psychological research, does he think that those conclusions have been arrived at on no evidence at all? If not, and it has been proved to the satisfaction of the most learned men, who have studied the subject that uncontrollable impulses exist, what right has he, who is clearly ignorant of the way they have obtained their conclusions, to assert that it cannot be proved that an impulse is uncontrollable? We can only describe it as setting up ignorance against knowledge, and marvel at those judges who deliberately prefer, instead of accepting the wisdom of the doctor and the psychologist, to fall down and worship Mr. Mayne's ignorance, merely because he has included it in a book on law.

The fact is that this part of his treatment of insanity is entirely valueless through lack of knowledge of the subject on which he writes. When he states that many people who are subject to no mental disease yield to apparently uncontrollable fits of passion and commit crimes, he does not realise that fits of passion are not the same thing as these insane impulses. No doubt the progress from sanity to insanity is a gradual one, as had been pointed out in the chapter on Illusions and Hallucinations, but the physical and mental symptoms of insanity are known to students of it, and description of some of the forms of it will be found elsewhere in this volume. The doctor and the psychologist know from observation of a person and his history

whether he is suffering from mental disease and what grounds there are for attributing to him the want of the power of self-control. When these symptoms are found to co-exist with actions that are not usually committed or not by the class of persons in question, so far as human experience tells us, the presumption is strong that we have here cause and effect, and the mere possibility of its being otherwise is not, in our opinion, sufficient to destroy the force of the natural inference.

Mr. Mayne further asks, when mental disease does exist how are we to know that it did more than supply the man with a motive for his act, while not depriving him of the power to refrain from it, if he had chosen ?

The words 'if he had chosen' plainly beg the whole question so far as 'uncontrollable' impulses are concerned. Such a question, however, merely shows that the author has no clear idea of what a motive is, or how ideas come to pass into action, or in what choice consists, or what is the meaning of control. It seems not improbable that he believes in the existence of a separate faculty of control, as the judges did in that of cognitive faculties.

Of course psychological knowledge is not required for the use of such words in ordinary life, and it would be pedantic to insist on it, but it is a different matter when a man is undertaking to write on the subject of insanity. A knowledge of the way in which emotion influences action and of the manner in which ideas are inhibited and maintained in consciousness and of the effect of organic disease in perverting emotions and inclinations would have dispensed with the desire to put such questions. Towards the end of the paragraph we find the usual disposition to hedge on the part of the person who is uncertain of his ground and whose conclusions are opposed to the popular instinct. We have no doubt that the plain man does believe in the existence in some cases of 'uncontrollable impulses,' and is divided between the desire to exempt from punishment in such cases and the fear that if he admits his conviction, some who do not really

suffer from them will escape the penalty of guilt, and so the public safety will be affected. This being so, it is an uncomfortable doctrine that though they exist uncontrollable impulses can never be proved ; it must follow from such a state of things that some persons will be hanged and punished who avowedly could not help what they did. Although, therefore, Mr. Mayne gaily starts with the assertion that in the case of those who cannot control their passion ‘ we hang them all the more on that account’—(an assertion which, by way of parenthesis, we are happy to be able to assure the reader is not true, *vide* exceptions 1 and 4 to s. 300 of the Indian Penal Code)—towards the conclusion of the section he changes his tone.

“ If a case,” he says, “ arose in which it appeared to be made out that mental disease had absolutely destroyed the capacity to govern the will, the case would probably fall under one or other of the two grounds of exemption stated in the Penal Code.” Mr. Mayne might again be less diffident and less hypothetical, for such a case would certainly fall under the grounds of exemption cited for the reasons given by us in the earlier part of this chapter, *viz.* that owing to the close inter-connection of the cognitive, emotional and volitional states, one cannot be affected without at the same time affecting the others. It will never fall under either of those grounds if the lawyers are right in the division of the faculties which they make. But what an astonishing admission to come from Mr. Mayne ! If an ‘ uncontrollable impulse,’ for it is nothing else than this to which he is referring, would fall under one or other of the grounds of exemption allowed in the Penal Code, why trouble to maintain the theory that such impulses are not a sufficient ground for the plea of insanity ? Why combat the correctness of Sir J. F. Stephen’s view and assert that the judges by their answers in *McNaghten’s* case excluded such a defence, for if it is not allowed in English law, *a fortiori*, is it negatived by the Indian Penal Code ?

But this is not all : so humane does our author at length become that he provides an alternative, in case the last suggestion

should not be accepted, as follows :—" If it did not, the conflict between law and mercy would have to be solved by the dispensing power of the executive, not by the exempting power of the judge. "

But why speak of mercy unless the writer really believes in the existence of uncontrollable impulses and the possibility of their proof ? It is clear that Mr. Mayne has all along been maintaining a thesis of which he was doubtful, or else that at the last he makes a weak concession to popular feeling and tries to throw the responsibility on some one else. There is no conceivable reason why the executive should be called in here to undo the work of the law unless that work has been wrongly done : for the executive is in no better position to determine the existence or non-existence of uncontrollable impulses than are the judges who try the case, and who are able to call for all available evidence on the point. The question to be settled is not whether a severe or a light sentence should be passed, but whether the man should be punished at all.

The burden of
proof in cases of
insanity.

10. Let us now proceed to consider the question from the second point of view.

This may be briefly re-stated as follows :—

It being shown in the earlier part of this chapter that the cognitive, emotional and volitional processes cannot be separated and do in fact never occur apart in consciousness, their interdependence is such that it is impossible that a derangement or perversion of any of these mental states can exist without extending through the whole psychical complex and affecting the other processes which enter into the total combination. If this be grasped as the groundwork of the argument, it seems to us that it must necessarily follow that, if it be shown that such a perversion of the emotions or volitions has occurred, the presumption to be drawn must be that the intellect has also been affected. At present the opposite presumption is made, as, *e.g.*, in the Calcutta case, because of the erroneous doctrine of the separate existence of cognitive faculties : with the overthrow of that

dogma and the substitution of the inter-dependence theory, exactly the contrary inference should in future be drawn. The burden of proof will then lie on those who assert that the intellect has remained unaffected and the man was sane.

No doubt they will appeal to his actions and his words, and point out that he employed considerable cunning : that there was deliberation and preparation for the act, and that it was done in a manner which showed desire for concealment. Or again, that after the crime he showed consciousness of guilt and made efforts to avoid detection or made false statements when charged with the act.(a)

Such facts, however, are not sufficient. In the first place it is known to every superintendent of an asylum that these very qualities are displayed by lunatics who would fully satisfy the restricted test of the Indian Penal Code as it is now interpreted. This, however, is a minor point. The view that we desire to urge is that the intellect is not destroyed in many cases, but is merely perverted to a use to which it would not otherwise be put by the fact that the end or purpose is a wrong one. The intellect becomes the servant of the impulse, and it is idle to urge that the man is sane because he employs the usual means to an end if insanity has deprived him of the power to choose that end. The opponent of the alleged insanity will, therefore, have to prove that there is nothing abnormal about the act itself rather than about the way in which it was done : he will have to show, *e.g.*, that it can be accounted for as due to some ordinary motive, that what was gained by it was not disproportionate to the means employed, that the risk incurred was such as most men would be prepared to face, or that the object was neither pursued with unusual vacillation nor with excessive tenacity considering the value that would ordinarily be put on it.

Again, if the deed ran counter to the agent's own interests or natural affections and was further an important one, which

(a) See Mayne, *op. cit.*, p. 421.

could not be attributed to mere carelessness, some explanation would have to be suggested, even though its accomplishment showed considerable ability on the part of the doer.

That mere comprehension of the difficulties to be overcome and ability in employing appropriate means to attain the end and to escape detection are not in themselves proofs that the agent is responsible for his acts might be inferred from the analogy of hypnotic patients. These people act entirely on the suggestion of others and have no volition of their own as regards the end of their actions, yet nevertheless they exhibit remarkable resource in inventing means for the attainment of the purpose suggested and often practise dissimulation with extraordinary skill. Indeed, a lesson may be drawn from their case which cannot fail to impress the candid observer. Here we often have all the apparent signs of intellectual capacity present so that, before we are informed that they are acting under the suggestion of another, we should, on this account, see no reason to suppose that they are other than agents responsible for their acts. We only judge them not to be so because of the abnormal nature of the acts themselves and the perversion of the ordinary emotions which they exhibit. Yet no one who has seen hypnotic displays doubts that these people are really irresponsible, or, if he does doubt, it is not on the ground that their 'cognitive faculties' appear to be unimpaired, but merely because he suspects that their emotions are feigned. Granting the genuineness of their emotional exhibitions he at once admits their irresponsibility, and he is always convinced when he is shown transitions of the patient from one mood to another with all the attendant signs at the word of the operator.

Now it is admitted that in the case of the insane we cannot in the last resort appeal to a first cause as visible as the operator in hypnotism, because the causes of madness often lie in the organism below the threshold of consciousness. But we can demonstrate the perversion of the emotions and volitions in a similar

manner as in the case of hypnotic patients, and when these symptoms have been proved, we ask for the same treatment as that accorded to the hypnotic experimenter.

The spectator who is there convinced of the genuineness of the emotional display says, ' I believe that the man is irresponsible for his acts, ' and this although the patient's intellectual processes appear to be normal. It is not necessary to call in the presence of the operator except to convince him on the first point : his conclusion as to the irresponsibility then follows.

But in the case of the lawyer it is otherwise : he will often admit that the abnormality of the emotional or volitional processes is satisfactorily proved in the case of the alleged insane, but he will not believe that the man is therefore irresponsible because he says that his intellect appears to be unaffected. If this is a good ground to remain a sceptic here, why does he not similarly remain a sceptic as to the responsibility of the hypnotic patient, for the conditions are the same in his case ?

The subject of insane impulses will be recurred to again later in the chapter on Responsibility and in the remarks on Moral Insanity and Hereditary Diseases, some repetition being unavoidable.

CHAPTER XI.

INSANITY (CONCLUDED)—INTOXICATION—SLEEP.

Not every mental disease implies irresponsibility—Suggested criteria—Degeneration—Irresistible impulses—Epilepsy, hysteria, mania—Forms due to excess of impulse—Criticism of certain legal opinions on the test of unsoundness of mind—Mental diseases due to defect of impulse—Aboulia, melancholia, hypochondria—Delusions—Fixed ideas—Different standards of insanity in law—Lucid intervals—Idiocy—Legal presumption that insanity continues how far valid.

Intoxication and sleep explained—intention and intoxication.

Moral insanity and hereditary diseases—the moral and physical not distinct—both depend on the organism.

WE must not however be taken to preach the doctrine that every abnormality of the emotions or volitions that is proved, however slight it may be, is sufficient ground for claiming that a man is not legally responsible for his actions. An attempt will now be made to indicate which forms of disease should be regarded as madness, and where psychologists as far as possible draw the line between soundness and unsoundness of mind.

So far as impulse is concerned, the unsoundness of mind may be due either to defect of it, as in aboulia or lack of will, or again it may be due to excess of it. The latter cases are more frequently regarded as madness, and so we will first treat of these instances of excess of impulse.

There are three criteria suggested by Ribot, *viz.*, the long duration of the emotion, disproportion between cause and effect experienced, and excessive or insufficient re-action. (a) And again an emotion is morbid when it is apparently disproportionate to

(a) Ribot, *Psychology of the Emotions*, pp. 62-63.

its cause or it is chronic, or its physical accompaniments are of extraordinary intensity.(a)

Another sign of importance is the appearance of the fixed idea. All the overpowering tendencies connected with the offensive instinct have a regular course; a physiological period of incubation marked by palpitations and vaso-motor disturbances marked by certain symptoms; then the entrance into the psychological period marked by the appearance of the fixed idea. This fixed idea gives an aim to the tendency: it includes an emotional state in some degree and is the beginning of an impulse; the third period is that in which it passes into action, though it is not always that it does this.

Now the presence of the fixed idea alone does not mean irresponsibility for an act, but as soon as it becomes an impulse and passion springs up suddenly and triumphs immediately, that stage is reached.(b) All these creations of impulse have the same characteristics: they are conscious, in-co-ordinated and incapable of struggle.(c) This is why these tendencies are called 'irresistible': to produce restraint there must be time, but in these cases the incitation is so violent as to pass immediately into action and all is over.

There may be fixed ideas with obsession or possession of the individual that do not necessarily mean that he is unable to control himself, but these have their origin in intellectual states, pure ideas, (not wants or feelings) *e.g.*, a man must always be counting, knowing names, asking questions, etc. These are not really important because their satisfaction is without danger, though they are apparently what the judges referred to in the preceding chapter would specially recognize as indicating an impairment of the cognitive faculties.

2. Most writers explain the origin and appearance of irresistible impulses by degeneration, *i.e.*, dissolution and retrogression. It is advisable to

(a) Ribot, *Psychology of the Emotions*, pp. 212—13.

(b) *Ibid.*, pp. 226, 412—3.

(c) Ribot, *Diseases of the will*, p. 62.

explain what this really means. Degeneration is a return to the reflex movements, it goes back to the stage of psychic life when the will as the arrestive power was not yet constituted. It acts on the line of strongest attraction or the least resistance, which is characteristic of reflex action and the opposite of the inhibitive will.(a)

There are regular stages from this region of reflex actions, where the state of consciousness expresses itself immediately in action, up to abstract ideas where action is altogether inhibited. These irresistible impulses show us the individual reduced to the lowest degree of activity, *viz.*, that of pure reflexes : the acts, if not unconscious, are not deliberate, they are immediate, irresistible with an adaptation invariable and of little complexity.(b)

The automatic character of these impulses is then a sign that they at least approximate to the class of reflex actions and are therefore due to degeneration, and the fact that they are frequently proved to be hereditary assigns them an organic origin.

Irresistible impulses may be divided into two classes, *viz.*, those with consciousness and those without. Instances of the latter are epileptics and hysterical persons : no one doubts that both of these classes are irresponsible for their acts. They display in a marked degree one of the tests already alluded to, *viz.*, physical accompaniments of extraordinary intensity, and their movements are further in the nature of reflexes and automatic in character. Yet the transition from the normal to the irresistible impulse is gradual, and epileptic madness corresponds to the lowest form of blind or animal anger which is extremely violent because connected with very powerful instincts. Next to this comes the maniacal state corresponding to the violent and conscious form of anger which includes a pleasurable element.

(a) Ribot, Psychology of the Emotions, pp. 226-8.

(b) Ribot, Diseases of the Will, p. 57.

In epileptic madness we find symptoms of anger carried to extremity resulting in blind violence, but the maniacal state may pass through all degrees from simple excitement to fury. These can be recognized by the physical accompaniments, which it would take too long to enumerate here and by the varying lack of co-ordination of ideas displayed. In some instances mania does not go beyond restlessness, craving for motion, exuberance of ideas, etc., and here the patient could not be considered irresponsible, but it is otherwise when the intense form is reached in which the symptoms of rage are found.

It may be remarked too that in both epileptic madness and mania these states are not evoked by any external excitement, such as the sight of an enemy in fury or disobedience. Hence they are described as motiveless, causeless, etc., but Ribot explains that "their cause, whatever it may be, is internal ; it sets going a pre-established mechanism identical with that of anger (violent and disordered movements, vaso-motor phenomena, etc.), and the psychic form which follows is anger, or an analogous emotional form, with or without a concomitant state of pleasure." (a)

It is important to notice that this feature is present also in many cases of irresistible impulses which some dispute are instances of unsoundness of mind.

The other class of irresistible impulses with consciousness,
 Other forms. are of affective origin, springing from needs and instincts. They include the impulses to homicide, suicide, arson, alcoholic excesses, to steal, &c. known as dipsomania, kleptomania, pyromania, erotomania and the like. The patient often has full consciousness of the situation and feels that he is no more master of himself but is irresistibly compelled to commit acts which he reprobates. Instances are known of men who voluntarily have gone to asylums, because convinced of their inability to abstain from acts of violence. The very last criterion to apply here is the

(a) Psychology of the Emotions, pp. 220-7.

fact that their cognitive faculties are not impaired: "the intellect remains sufficiently healthy, the madness exists only in the acts." (a) Those persons who cling to the traditional interpretations of knowledge of right and wrong and knowledge of the nature of the act as the tests of insanity, do not sufficiently realize that in the cases alluded to above, they are in the region of the impulses and the instincts and not of the intellect, or at least that the intellect is no longer a power in the matter.

"The intellectual adaptation," says Ribot, "is very weak, at least very unstable: rational motives are powerless to act or restrain from actions: the impulses of an inferior order gain all that the higher impulses lose." (b) The will, *i.e.*, rational activity, disappears and the individual falls back into the domain of instinct; the will is impaired in measure as the lower activity is augmented. What remains is a struggle between two groups of contrary tendencies or impulses.

3. Before leaving the subject of irresistible impulses, *i.e.*,

Criticism of certain
legal opinions.

unsoundness of mind due to excess of impulse, we may revert for a moment to certain dicta of legal authorities on the point.

Thus Mr. Mayne, in a passage already quoted, states that it is a matter of every-day experience that persons who are subject to no mental disease yield to apparently uncontrollable fits of passion and commit crimes. To this we replied that these fits of passion are not the same as the irresistible impulses under discussion, and we may here quote Ribot's words on this point. "So long as anger is not injurious either to the individual himself or to others it is normal and even useful, . . . however, it must be recognized that the area of normal anger is exceedingly restricted and that no emotion more quickly assumes a morbid character. Of the three tests which permit us to

(a) Ribot, *Diseases of the Will*, p. 58, *et seq.*

(b) *Diseases of the Will*, pp. 54, 65, 70.



judge whether it does so or not, one—that of violent re-action on the organism—is of no use because it gives too much scope to personal estimates and conjecture. There remain two others—the absence of rational motives, and chronicity or excessive duration, normal anger being only a passing affection. Now, we find among mental diseases too derivatives of anger, two heightenings of this condition in paroxysmal form, etc.,” and there then follows a description of the physical accompaniments.(a)

Now it is clear that Mr. Mayne simply looks to the one test which Ribot here declares to be of no use, and so says that he cannot distinguish fits of passion from uncontrollable impulses. We would invite him to apply the other two.

Again we may quote a saying of Rolfe, B : “ It would be a most dangerous doctrine to lay down, that because a man committed a desperate offence with the chance of instant death and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity.”(b)

On this it is to be observed that, in spite of the learned judge’s opinion, this is one of the tests to be applied, *i.e.*, disproportion between cause and effect experienced, as already pointed out, for exceptionally violent actions are simply unusually violent emotions or impulses translated into action and these are in turn due, in the absence of any extraordinary cause to which they may be attributed, to an organic origin as already explained when speaking of degeneration.

With this utterance of Rolfe, B., may also be contrasted the utterance of Bramwell, B., who made it a test to the jury “ would the prisoner have committed the act if there had been a policeman at his elbow ? ” Apparently the former judge would have refused to regard the man as insane even in this case, while

(a) *Psychology of the Emotions*,
p. 223.

(b) *Reg. v. Stokes*, 3 C. & K., 185.

the latter judge would have excused him. This test, however, is really no better than the first one. Because a man would have restrained himself in the presence of a policeman it does not in the least follow that he was also able to do so in his absence. It is well known that an impulse may be inhibited by awaking another and contrary impulse and that automatism can be produced by the recollection of the use of an object when it is presented to the subject. "An impulsive act is not unfrequently induced by the *sight* of an appropriate object. Max Simon gives an instance of a learned man who was seized by an overwhelming impulse to cut his throat when he was shaving, and who could only overcome it by desisting from the operation." (a) Hence the actual presence of a policeman and the associations of punishment connected therewith might be adequate to awake the emotion of fear in a man, whereas the mere recollection of the law might be quite unable to arouse any impulse at all ; indeed in the presence of a strong impulse already in the field a mere idea of that kind would be highly unlikely to have any result.

A second dictum of Bramwell, B., was as follows : " It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence or homicidal tendency. But the circumstances of the act being apparently motiveless is not a ground from which you can safely infer the existence of such an influence. Motives exist, unknown and innumerable, which might prompt the act. A morbid and restless but resistible thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints all tending to the assistance of the person who is suffering under such an influence—

(a) Binet and Féré, *Animal Magnetism*, p. 282.

the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing murder.” (a)

It appears to us lamentable that such an utterance should be reproduced as a guide to students, as it is apparently intended by Mr. Mayne. The judge seems to us to be so hopelessly on the wrong tack and to have so entirely failed to grasp the situation, because he will insist on treating madness as though it can be explained on normal grounds. No efforts of this kind can be successful : the ground of normal psychology must be abandoned here and the class of facts with which we are dealing must be treated by the pathological method.

The situation is that we have an unusually powerful impulse to deal with, and the reason of its unusual powerfulness is that owing to degeneration the organism is so constituted that impulse and instinct reign supreme while the intellect is powerless. Action follows immediately on incitement in an automatic way, analogous to a reflex action, and allows no time to the arrestive power of the will to interfere. To talk therefore of religion, conscience and the law being powerful restraints in such a case is mere fiction : these represent certain influences which may be awakened by ideas in the normal state of mind when there is time for reflection and the will is active. The present field of consciousness is an entirely different one, in which the only power that could be of any use would be the immediate awakening of a strong counter impulse caused by some present stimulating external or internal excitement in the form either of a sensation or perception. We cannot help therefore regretting that the learned judge should reject what is in fact one of the tests that should be applied in the case, *viz.*, the absence of motive and should lay stress on considerations that have no possible application here.

Aboulia, melancholia, hypochondria, etc., and diseases due to defect of impulse.

4. We shall now briefly treat of some derangements due to defect of impulse, *viz.*, aboulia or lack of will, melancholia, lypemania, stupor, hypochondria and imaginary diseases.

Here the mental faculties except volition may be sound, the intelligence perfect, the end clearly conceived and also the means, but the transition to act is impossible. The patient may frequently manifest the desire to act but he cannot will to execute the acts desired, and this although the muscular system and organs of movement are intact.

The will fails here from an entirely different reason than in the case of irresistible impulses. There the power of inhibition and co-ordination being absent the impulse expends itself entirely to the profit of automatism : here, the intellect is sound but the impulse lacking. The intellectual apprehension of what should be done altogether outruns the power not only of carrying out but even of attempting.

Just as in the case of irresistible impulses there is a general heightening of the vital activities, so in the diseases now referred to there is a notable depression of them, and a weakness of the natural states corresponding to the feelings.

It may be noticed that here again the test of the judges, *viz.*, the impairment or non-impairment of the cognitive faculties fails for "the cerebral acts which are the basis of the intellectual activity (the concept of an end and of means, choice, etc.), remain intact, but there is lacking to them those concomitant states which are the physiological equivalents of the feelings, and whose absence occasions the defect of the impulse."^(a)

The attention therefore must again be directed to the impulses and not the intellect when judging of such cases of unsoundness of mind. It may be pointed out that aboulia is produced by opium eating among other causes, and the reason of the

(a) Ribot, Diseases of the will, p. 54, and pp. 28-40.

unreliability of opium consumers as witnesses is not so much that their moral sensibilities or aspirations are weakened, as is sometimes supposed, as their volitional weakness. They cannot carry out what they desire but yield easily to another's will. In hypochondria, melancholia and such states there is a transformation of spontaneous attention into a fixed idea. These and what are called 'imaginary diseases' are often wrongly regarded as unreal; but although genuine diseases, there is no justification for classing persons so afflicted as insane. They may be described as debilitated and degenerate. There are certain organic disturbances with well-known physical accompaniments, which first depress the feeling in general and then pervert it. Gradually these morbid states take form and organise and unify themselves in some false conception which becomes the centre of attraction to which all converges. They do not act like sudden emotions the effect of which is violent and temporary, but by slow silent actions of unconquerable tenacity that tend to modify the ego to its very depths.(a)

When the new feeling is of a powerful nature it completely changes the individual, but as the action is throughout gradual it is extremely difficult to say at what point the person can be deemed to be of unsound mind in the legal sense. That question, however, does not often arise, because the tendency of patients of this class is to refrain from action: their disease mainly consists in their inability to act or to will, and so they do not bring themselves within the grasp of the law.

5. Finally it seems necessary to add something to what has been already said on the subject of fixed ideas. To the popular mind, fixed ideas and delusions are very frequently signs of madness, but neither are necessarily so.

Delusions are false opinions about a matter of fact and sometimes do and sometimes do not involve false perceptions of

(a) Ribot, *Diseases of the Personality*, p. 53, *et seq.*

sensible things. In the case of the insane they are apt to affect certain typical forms hard to explain: in many instances they are theories which the patients invent to account for their abnormal bodily sensations; in other cases they are due to hallucinations of hearing and sight.^(a) Those who have studied insanity have no difficulty in recognising the typical forms, and the question whether the delusion denotes insanity or not is eminently one for expert evidence.

Fixed ideas always coincide with an advanced stage of mental disease though they often are not a
 Fixed ideas. form of insanity in the legal sense. They may be merely a diseased excrescence which does not suppose a total transformation of the individual.^(b) There are practically three classes of them, *viz.*, (1) simple fixed ideas of a purely intellectual nature; (2) fixed ideas accompanied by emotions, such as terror and agony, the insanity of doubt; and (3) fixed ideas of an impulsive form. These last manifest themselves in violent or criminal acts, such as suicide and homicide and are the only kind that should be held to indicate irresponsibility in law. They are in fact in such cases the irresistible tendencies already alluded to.^(c)

Speaking of fixed ideas in general, Ribot says that they are a symptom of degeneration and the persons who have them are not therefore insane. "They certainly are not of sound mind; but the epithet insane is undeserved. They are debilitated, unbalanced. Their frail, unstable mental co-ordination yields to the slightest shock; but it is a loss of equilibrium, not a fall. The authors that have investigated the determining causes of fixed ideas, all reach the same conclusion; they find it namely to be a symptom of degeneration. . . a primordial condition—the neuropathic constitution is requisite. . . ." ^(d)

(a) James, *Principles of Psychology*, Vol. II, p. 114, note.

(b) Ribot, *op. cit.*, pp. 136-7.

(c) Ribot on attention, pp. 78-9.

(d) *Ibid.*, pp. 82-3.

He also shows how the mechanism of the fixed idea resembles that of ordinary attention : there is no difference of kind but only of degree. The fixed idea has a greater intensity and a longer duration, but if a state of spontaneous attention were similarly strengthened and rendered permanent, the whole array of irrational conceptions that form the retinue and present a fictitious appearance of insanity would of necessity be added to it as the mere result of the logical mechanism of the mind. At the same time the fixed idea presupposes a considerable weakening of the will, that is of the power to re-act.(a) When a man possessed by a fixed idea is merely a witness who has to give evidence, his evidence will be accepted on other points than that to which the fixed idea relates. At least this is the case of the monomaniac, concerning whom it has been so laid down, and who is termed in the law decisions 'partially insane.'(b) This agrees with the view of Ribot already quoted that a fixed idea is often only a diseased excrescence which does not suppose a total transformation of the individual.

6. At the same time the designation 'partially insane' is not of much assistance : it does not help us to decide at what point in the gradual transition from the normal to the abnormal the individual is to be considered of unsound mind, which is the real crux, nor do we think that this is achieved by the tendency to employ a different standard when it is a question, *e.g.*, whether a man is to be held responsible for a murder, or whether he is to be held to a contract which he has signed. Thus Best remarks that there are two, if not more, distinct standards of mental alienation known to the law, *viz.*, (1) that which is sufficient to exculpate from a criminal charge where ordinary lesion of intellect is not sufficient, but there must be unconsciousness of commission of a crime ; (2) the degree of

(a) Ribot on attention, pp. 84-7.

Evidence Act, p. 885.

(b) Ameer Ali and Woodroffe, Indian

insanity which will support a commission of lunacy, *i.e.*, a state of imbecility and incapacity to manage affairs; (3) the degree of unsoundness of mind which will avoid contracts, deeds, wills, &c., which is intermediate between (1) and (2).^(a) Thus it has been held that mere weakness of mind or partial derangement does not make a man incapable of contracting.^(b)

Here as elsewhere we cannot decide the mental state merely by looking to the consequences of the action or of our decision, which is what is really being attempted. What has to be determined in each case is whether the man's rational self has acted or not, whether he has been able to resist the influence against him or not, and for more on this we must refer to the remarks upon insane impulses and responsibility.^(c)

7. There remain for consideration lucid intervals.
lucid intervals in insanity and idiocy.

"The idiot," it is said, "can never become rational; but a lunatic may entirely recover or have lucid intervals . . . thus a lunatic during a lucid interval may be examined."^(d) It is also provided in s. 12 of the Indian Contract Act that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Any opinion to the contrary would appear to be due to a false idea of the ego or self: there is no permanently existing diseased self which appears and disappears at intervals, and thus may infect the intervening period during which the subject is apparently sound, but the preponderating state of consciousness at each moment constitutes to the individual and to others his personality.

"These contradictions in the personality," says Ribot, "these partial scissions of the ego, such as are found in the lucid moments of insanity and delirium, in the self-condemnation and reprobation of the dipsomaniac, while still drinking, are not

(a) Best on Evidence, § 150.

(c) See Chap. XV.

(b) Cunningham and Sheppard's Indian Contract Act, p. 47 and cases quoted in note (a) there.

(d) Ameer Ali and Woodroffe, *op. cit.*, p. 885.

oppositions in space (from one hemisphere to the other) but oppositions in time . . . successive attitudes of the ego. . . . If we are thoroughly impregnated with the idea that the personality is a consensus, we shall have no difficulty in comprehending that the mass of conscious, sub-conscious and unconscious states which constitute it, may, at any given moment, be summed up in a tendency or preponderating state which is its momentary expression both to the individual himself and to others. Suddenly the same mass of constituent elements is recapitulated in some contrary state, which thereupon assumes the front rank." (a)

That the idiot can never become rational is perhaps too sweeping a statement: it ignores the fact that
 Idiots, there are degrees of the state. "Idiocy

has various degrees from complete nullity of intelligence to simple weak-mindedness, according to the point at which arrest of development has taken place." (b) At the same time it is true that when the idiot is one whose brain does not contain the whole cerebral mass you cannot create it, though in the case of the young where it has been due to some malformation which has prevented the brain from developing removal of the cause will lead to improvement.

To educate imbeciles and idiots is extremely difficult because they are bereft of the faculty of attention; the system is to make use of those senses which fulfil their function in order to develop those which do not, and after a long course of training "it becomes possible to raise the idiot more or less near to the level of ordinary perceptual consciousness." (c)

It has sometimes been remarked that persons of this type are particularly trustworthy as messengers and in carrying out instructions, if you can once get into their heads what it is they are required to do: this is due to their narrow range of interests and the resulting absence of distracting considerations. For the

(a) Ribot, *Diseases of the Personality*, p. 111.

(b) Ribot on *Attention*, p. 103.

(c) Stout, *Anal. Psych.*, Vol. II, p. 29.

same reason they sometimes show unusual powers of memory : they recall remarkable series of objects contiguous in time and space because there are no other divergent lines of association to compete with those which are formed by the mere sequence of external impressions.(a) [To systematically distrust the idiot as a witness would therefore be an error : within the limits of his observation he may be expected to be particularly correct in his account of occurrences.

8. There is said to be a presumption in law that insanity which has been once established will continue, and that the burden of proof of a subsequent lucid interval lies on the party who asserts it. (b) This is based on another general presumption that things generally remain the same, including persons, personal relations, states of things, individual's opinions and states of mind.(c)

It is not supposed that such a presumption really weighs very much, but we cannot refrain from remarking that the value of it is simply nil : it is mere prejudice, and, as Mr. Bradley says, "the general disposition to believe that what has been is, or that what is usually is always, cannot seriously be offered as a conclusive argument."(d) Apparently, however, in law it would be conclusive in the absence of any evidence to the contrary, in spite of its lack of foundation. As we have occasion to examine this general presumption again in other connections we shall not say anything further about it now, but so far as it is applied to insanity we will quote the improved form in which it has appeared in Ameer Ali and Woodroffe's edition of the Indian Evidence Act, *viz.*, "there arises, in the case at any rate of insanity of a permanent type, a presumption that insanity continues." And again, "sanity or insanity once proved to exist is presumed to

(a) Stout, *Manual of Psychology*, p. 457.

(b) *Best on Evidence*, p. 341.

(c) *Taylor on Evidence*, §§ 196, 197.

(d) *Mind*, N. S. No. 49, p. 31.

continue; but *aliter* as to temporary insanity produced by drunkenness, violent disease or otherwise.” (a)

What we would ask is, where is the presumption in either case? Both statements appear to be mere truisms if one is to attach any meaning to the words ‘permanent’ and ‘temporary.’ Of course if the insanity is of a permanent type it will continue: you know it is permanent and therefore you know it will continue, for what is a permanent thing but that which continues? You merely state the same thing twice over in different words and there is no presumption in the matter.

Similarly with regard to ‘temporary,’ how can you call a thing temporary unless you also know that it will come to an end? And, if you know that, there is no presumption in saying that it will not continue. It would seem therefore that the learned authors did not feel satisfied as to the truth of the ordinary legal presumption quoted above and therefore attempted to import some certainty into it by the use of tautology, a method which may be satisfactory to them but not very luminous to the student.

The fact appears to be that no general presumption can be drawn concerning the continuance or non-continuance of insanity: it is possible to draw presumptions from the symptoms of certain kinds, because these indicate that the madness is an incipient stage of a form that never disappears but continues to progress. As however some forms are only periodic and in others recovery is usually certain, unless other causes supervene, to presume here that the insanity will continue is mere error.

9. A confession made by a prisoner when drunk has been received although contracts entered into by a party in a state of total intoxication are void: on the other hand what a person is heard to say while talking in his sleep is not evidence against him ‘for here the suspension of the faculty of judgment may fairly be presumed complete.’ (b) In both cases the mind is not in its

(a) Ameer Ali and Woodroffe, *op. cit.*, pp. 804 and 782.

(b) Best on Evidence, § 529.

natural state, and it seems doubtful whether such an admission could in either instance be said to have been really voluntarily made ; moreover it is not easy to understand why the distinction has been made between the two cases, as though the circumstances are not exactly similar the result must be much the same. In sleep the higher centres of the brain are entirely cut off, whereas in drunkenness, though we do not know precisely what happens, it is a case of confusion : the connecting channels are there but the wrong ones are used.

It would no doubt be unsafe to accept the utterances of a sleeping person for self-control, reason, and the power of inhibition being absent, the imagination has full play and men are then wont to reproduce things as they would have wished them to go and not as they actually went. Action is easier than inhibition, and so a man would reproduce a murder as he planned it and, if he in fact controlled himself at the last and did not commit it, it is not unlikely that he would fail to reproduce this. Likewise in drunkenness, whatever the exact cause, it may be inferred from the fact that the reflexes are exaggerated or violent, that the inhibitive power is injured and the usual restraining considerations are inoperative ; the man's statement also should be received with caution as he is specially open to suggestion because his will is weakened and in him apperceptive systems act in abnormal isolation^(a), and the same doubtless applies to the states of mental disorganization due to the use of drugs. This suggestibility is of course a prominent feature of the hypnotic trance, and the presence of it both there and in intoxication shows how close the state of the drunkard's mind approximates to that of the sleeper.

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| Intoxication and intention. | In s. 86 of the Indian Penal Code it is said : " In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same |
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(a) Stout, *An. Psych.*, Vol. II, pp. 155-6.

knowledge as he would have had, if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will." Mr. J. D. Mayne, commenting on this, writes :—" § 86 lays down no rule as to inference of intent in cases of intoxication . . . A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should follow. As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention ; since, assuming the knowledge, the law will allow no other explanation of the act to be given." (a).

This argument depends on the statement that the question of intention is merely the question of knowledge the truth of which we deny on psychological grounds, but as it is fully discussed in the chapter on Intention the reasons for the contention will not be set forth here. Similarly for a discussion on the difficulties attending the theory that a man is assumed to intend the natural or necessary consequences of his own acts, the reader is referred to the same chapter and also to the remarks concerning 'natural and probable consequences' in the chapters on Causation and the Theory of the Normal Man.

10. The subjects of moral insanity and hereditary diseases are so much concerned with the question of responsibility that we are compelled to repeat later some of the remarks made here. The attitude of most persons towards so-called moral insanity is to refuse to recognise its existence, and this no doubt is the legal position : at the same time those who hold this view are somewhat uncomfortable about it and betray some hesitation in their utterances. This is illustrated by the following

(a) Mayne, Criminal Law of India, 2nd. Edn., p. 425.

passage :—"Now the researches of modern physiologists have shown that madness is not an infliction sent direct from Heaven, but a bodily disease, which may often be completely cured; and that there are many inferior forms of diseased or disordered mind and imagination which influence the conduct of persons who are, in other respects, perfectly capable of taking care of themselves and transacting the ordinary business of life. Some even go so far as to assert that there exists a form of the disease to which they have given the name of 'moral insanity,' in which no *delusion* of any kind exists; but the patient's moral character is revolutionised, and he is hurried against his will, by some uncontrollable impulse, into the commission of acts of violence and crime. Although this state of mind is not recognised in our jurisprudence, and its existence as matter of fact is extremely questionable, still the above discoveries show how arbitrary and imperfect any line drawn by law on such a subject as the present (*i.e.*, insanity) must necessarily be."(*a*) The writer has little doubt personally that many who decline to recognise moral insanity do so in defiance of their own beliefs, simply from the conviction that, if its existence were acknowledged, it would deplorably affect the safety of society: they hold that every criminal would plead it, and that there is no satisfactory criterion by which to decide the truth or falsity of such a plea. It would therefore play fast and loose with responsibility and bring disorder and confusion into the criminal law.

How far such a utilitarian attitude is justified appears a question of moral and political philosophy which cannot be discussed here: it is touched on later under the heads of Responsibility and Punishment. At the same time it is always an unsafe position to assert what is contrary to one's own beliefs, and in the writer's opinion it is better to admit what seems to be true and, facing the situation, to take the best measures one can to meet it.

(*a*) Best on Evidence, § 150.

Most will allow the existence of homicidal mania, but some will not that of kleptomania, because in the one case they are prepared to go the further length of shutting up the culprit in a madhouse while in the other they are not, but will only go so far as to shut up the man in prison : this is usually a mere compromise based upon what is supposed to be compatible with the interests of society in each case. It is true that some will defend the distinction by asserting that the homicide gains nothing by his act, and therefore his crime being without a motive he must be mad, whereas the kleptomaniac is prompted by gain : his act is not motiveless, and so one of the signs of madness is absent. This argument however is overthrown by the many instances which can be adduced of persons comparatively rich who have stolen articles which they could have easily bought, and also by the valueless character of what is sometimes stolen. Indeed in such cases exceptions are frequently made in our law courts and the accused is held not to have been responsible for his act.

The difficulty is greater in cases of unprovoked assault, sudden indulgence of the sexual passions and the like : in the former there is the same want of motive, and in the latter we are too ignorant of what constitutes motive and the strength of instinct and the physiological disposition to enable us to form a decision with certainty. When however we trace an hereditary tendency to the same weakness displayed in two generations as, *e.g.*, with alcoholism, we begin to doubt whether it was in the man's power to have acted differently. If we are satisfied that it is not the man's fault that his will was not otherwise, it would seem that he cannot rightly be regarded as guilty, and with this remark we must leave the matter, or we shall merely repeat what is said elsewhere concerning Responsibility, Compulsion, and Will.

A protest however must be made against a view that we have seen more than once put forward, *viz.*, that the moral and physical are entirely distinct and you cannot confuse the two,

The moral and physical not distinct but connected.

as you are doing when you speak of 'moral insanity'. No doubt this seems a clear distinction to the plain man but in reality it is an illusion : the moral and the physical in the last resort both depend upon the organism. This has been already shown in the organic origin assigned to uncontrollable impulses and is clearly stated by Ribot in the following extracts :—

"It would be useless to adduce a mass of data and arguments to establish the fact that pleasure and pain depend upon tendencies, which in turn depend upon the organism the agreeable and the disagreeable vary exactly as tendencies do. Where the normal man with normal inclinations will find pleasure, the abnormal man with abnormal inclinations will encounter pain, and *vice versa*. Pleasure and pain follow tendency, as the shadow follows the body. Let us begin with the tendencies connected with the fundamental function of nutrition. Everybody knows of the 'cravings' of pregnancy. As the consequence of poor nutrition in the first months. there are produced digestive, circulatory and secretory perturbations, which reveal themselves in the form of strange appetites and depraved tastes Is it necessary to dwell at length upon the deviations and perversions of the sexual instincts ? Here instances abound. Even after making ample allowance for imitation, for wilful debauchery, and for that which comes rather from the head (from the imagination) than from the senses there still remains an abundant harvest. The same conclusion always asserts itself: change the organization, and you will change the tendencies, and moreover you will change the position of pleasure and pain : the latter, accordingly, are but phenomena of indication, or signs to the effect that the necessities of the organisms, whatsoever they be, are satisfied or thwarted.

If it be thought that the inclinations I have just enumerated are of too physiological a nature, I may cite the great group of irresistible impulsions which includes the ungovernable craving for drink, the unconquerable impulse to steal, to practise incendiarism, to kill, to commit suicide. To the consciousness of the

individual these impulsions are without cause, without reasonable motives, and that is so because their true cause, the conditions of their genesis are beneath consciousness ; it knows only the results of this unconscious work These various morbid manifestations . . . are regarded as symptoms of one and the same cause, namely, degeneration.”(a)

The concluding part of the quotation gives the key to the matter : the cause of moral insanity is beneath consciousness, but that is no ground for refusing to recognize the true character of its effects, which to the unprejudiced mind of the observer of pathological cases must surely appear to be similar in kind to those of recognised forms of insanity.

To the same effect is the conclusion of another well-known writer :—“When the mind undergoes degeneration, the moral feeling is the first to show it, as it is the last to be restored when the disorder passes away ; the latest and highest gain of mental evolution, it is the first to witness by its impairment to mental dissolution . . . In undoing a mental organisation, nature begins by unravelling the finest, most delicate, most intricately woven, and last completed threads of her marvellously complex network. Were the moral sense as old and firmly fixed an instinct as the instinct to walk upright, or the more deeply planted instinct of propagation—as many people in the presumed interests of morality have tried to persuade themselves and others that it is—it would not be the first to suffer in this way when mental degeneration begins ; its categorical imperative would not take instant flight at the first assault, but would assert its authority at a later period of the decline ; but, being the last acquired and the least fixed, it is most likely to vary, not only in the pathological way of degeneracy but also in physiological ways, according to the diversities of conditions in which it is placed.” (b)

(a) Ribot on Attention, pp. 107-110.

(b) Maudsley, Body and Will, p. 266.

CHAPTER XII.

HALLUCINATIONS, ILLUSIONS, HYPNOTISM.

Hallucinations and Illusions distinguished—Sensations and Images in Hallucinations—The Physiology of Hallucination—Causes of Hallucination—Artificially-produced Hallucinations—Illusions defined—Their subject-matter and causes—Their limit—Hypnotism—Suggestion explained—Who are liable to Suggestion—Power of Resistance to Hypnotism—Value of the Statements of Persons who have been Hypnotised—Responsibility of the Hypnotic Criminal.

ALLIED to madness are some forms of hallucinations, our next subject of discussion. But first we must try and distinguish them from Illusions, of which we shall speak later, which is not easy to do. [“In ordinary parlance,” says Prof. James. “hallucination is held to differ from illusion in that whilst there is an object really there in illusion, in hallucination there is no objective stimulus at all.”] We shall presently see that this supposed absence of objective stimulus in hallucination is a mistake, and that hallucinations are often only extremes of the perception process, in which the secondary cerebral re-action is out of all normal proportion to the peripheral stimulus which occasions the activity. Hallucinations usually appear abruptly and have the character of being forced upon the subject. But they possess various degrees of apparent objectivity. One mistake *in limine* must be guarded against. They are often talked of as mental *images* projected outwards by mistake. But where an hallucination is complete, it is much more than a mental image. An hallucination is a strictly sensational form of consciousness, as good and true a sensation as if there were a real object there. The objects happen not to be there, that is all.”(a)

(a) W. James, Principles of Psychology, Vol. II. p. 115.

It seems that Professor James would hardly class a real hallucinations what are frequently understood as such ; for speaking of pseudo-hallucinations he says that these are milder degrees of hallucination ; they remain always subjective phenomena which the individual regards assent to him as a sign by God's grace, or as artificially induced by his secret persecutors. They are more vivid, minute, detailed, steady, abrupt and spontaneous than the ordinary images of memory and fancy, and lack the character of objective reality. Such are the 'voices' which people hear, and which become real hallucinations.(a)

These utterances suggest that no real line can be drawn between the two states, and there is little doubt that this is the case. Thus Professor Sully says: "Illusion and hallucination shade one into the other much too gradually for us to draw any sharp line of demarcation between them. And here we see that hallucination differs from illusion only in the proportion in which the causes are present. When the internal imaginative impulse reaches a certain strength, it becomes self-sufficient or independent of any external impression,"(b) and he instances the case of the insane man who takes any small objects, as pebbles, for gold under the influence of the dominant idea of being a millionaire, where external suggestion can have very little to do with the self-deception. And again "an illusion, it is said, must always have its starting point in some actual impressions, whereas hallucination has no such basis. Thus it is an illusion when a man, under the action of terror, takes a stump of a tree, whitened by the moon's rays, for a ghost. It is a hallucination when an imaginative person so vividly pictures to himself the form of some absent friend that, for the moment, he fancies himself actually beholding him. Illusion is thus a partial displacement of external fact by a fiction of the imagination, while hallucination is a total displacement";(c) but he points out that in most hallucinations it is impossible to prove that there is no modicum of external agency

(a) W. James, *Principles of Psychology*, Vol. II, pp. 115-117.

(b) Sully, *Illusions*, p. 111.

(c) *Ibid.*, pp. 11, 12.

co-operating in the production of the effect, *e.g.*, in the case of imagined exterior 'voices' quoted by Prof. James there are faint impressions in the mad man's ear.

We must not then be taken to deny that most hallucinations have some basis of fact when for convenience of treatment we divide them off from illusions, our distinction being simply that in illusions there is more substratum in the shape of a real object, and this is as near as we can go to the popular conception.

2. The next point to make clear is the relation of hallucinations to sensations and images. Here we must assume some knowledge on the part of the reader of sensations and percepts, as space forbids us to enter into a description of them, and will merely remark, *for the purposes of this discussion*, that, except in the case of organic sensations, both have to do with external objects as their starting point: and we must ask that it be understood that we are excluding from these remarks the apprehension of feelings and our mental states.

"Hallucinations are often described as abnormally intense images which simply by reason of their intensity are mistaken for percepts. But such statement, though supported by very high authority, is almost certainly false, and would probably never have been made if physiological and epistemological considerations had been excluded as they ought to have been. Hallucinations, when carefully examined, seem just as much as percepts, to contain among their constituents some primary presentation—either a so-called subjective sensation of sight and hearing or some organic sensation due to deranged circulation or secretion." (a) The same author then asks "why do we not confound percept and image when what we imagine is imagined as definitely localized and projected? Because we have a contrary percept to give the image the lie; where this fails, as in dreams, or where as in

(a) J. Ward, *Art. Psychology*, *Encyclopædia Britannica*, Vol. XX, p. 58.

hallucinations the image obtains in other ways the fixity characteristic of impressions, such confusion does in fact result.”(a)

As our object is to show the closeness of hallucination to the normal state, and the consequent difficulty sometimes of detecting it and the danger of being deceived in the matter, either through minimising or over-estimating its importance, we shall also exhibit the relation further from the physiological side.

**The Physiology of
Hallucination.**

Hallucination is thought to be produced by an excitement of the sensory centres(b) : it does not result from any lesion of the retina or of the media of visual perception, but it and sensation have the same seat in the brain, and perception and hallucination employ the same class of nervous elements. Hallucination occurs in the centres in which the impressions of the senses are received : we have to do with positive sensation and not with error of judgment. The hallucinatory image acts precisely as a real sensation would do from the point of view of simultaneous contrast, *i.e.*, in producing complementary colours. They correspond with the same physiological process, otherwise the same effects of chromatic contrast would not occur in both cases. So again every hallucination of some persistence is succeeded on its disappearance by an after-image, just as in the case of ordinary sensations which affect the retina. Similarly in the mental vision of normal individuals the persistent *idea* of a brilliant colour develops an after-image of the complementary colour, just as a real sensation does.

This shows the close connection which unites sensation, hallucination and memory, which are based on the same physiological operation and are effected in the same region of the nervous centres. Whether it is a real impression of the coloured, or

(a) J. Ward, Art. Psychology, Encyclopædia Britannica, Vol. XX, p. 58.

(b) Binet and Féré, Animal Magnetism, p. 246. (M. Binet thinks that

all hallucinations must start in the periphery, while Prof. James holds that this is not always the case, and that centrally initiated hallucinations can exist.)

the colour is pictured by the memory, or seen by an hallucination, it is always the same cell which vibrates. The hallucination of a colour is a suggested sensation which occupies the same region of the cerebrum as a real sensation. An hallucination arouses the general sensitiveness of the eye just as it is aroused by waving a real object before the subject's eyes, which proves that hallucination excites the visual centres.(a)

Similarly Ribot : "Whereas to the earlier psychologists, an image or idea was a kind of phantom, without definite seat, existing 'within the soul,' differing from perception not in degree but in nature, resembling it 'at most only as a portrait resembles its original;' to physiological psychology, on the contrary, there is between perception and image identity of nature, identity of seat, and only a difference of degree. The image is not a photograph but a revival of the sensorial and motor elements that have built up the perception. In proportion as its intensity increases, it approaches more and more to the condition of its origination, and so tends to become an hallucination."(b)

The concluding words show that the hallucination is merely a very vivid mental image, and that such an image is very close to the original sensation.

But we can mark closer the resemblance between the ordinary image and the hallucinatory one by reference to belief. Most psychologists, including, *e.g.*, Dugald Stewart and M. Taine, hold that every image involves a momentary belief in the reality of its object : "in every image presented to the mind there is therefore the germ of an hallucination, which only needs development. Such development occurs in the hypnotic state, in which it is only necessary to name a given object to the subject in order that the image suggested by the experimenter's words should become an hallucination. Thus there is only a difference of degree between the idea of an object and the hallucination of that object."(c) Further, one hallucinatory image suggests another in

(a) *Ibid.*, pp. 246-262.

(b) Ribot on Attention, p. 48.

(c) *Animal Magnetism*, p. 220.

virtue of the bond that unites them, just as in ordinary mental life : "it is not merely the image taken by itself which is externally projected, but the bond of association which unites several images. It is in fact this association which formulates the hallucination ; it produces the successive projection of the images in the order in which they are grouped in the mind. . . . In reply to the question ' what is meant by external projection ? ' We answer that it is the belief in the reality of a thing. The external projection of an image is, therefore, the belief in its reality. So that, if it is true that we are inclined to make an external projection of the associated images existing in the mind, this implies that we are inclined to believe that things are in reality associated together, just as their images are associated in the mind." (a) Finally as to perception we may quote M. Taine's description of external perception as a true hallucination, and M. Binet's statement that "it presents on a small scale the phenomena which occur on a large scale in hypnotic hallucination—deviation, duplication, and enlargement of the mental images. Hallucination must therefore be a disease of external perception." (b)

3. Since then hallucination resembles normal states in so

Causes of hallucination.

many points the reader will not be surprised to hear that according to the statistical researches of E. Gurney about one out of every ten healthy persons has at some time been the subject of hallucination. (c) In the case of sane persons when hallucinations are not brought on by exhaustion or artificial means they have their origin in a preternatural power of imagination (d) : of hallucinations generally the following are the causes as given by Griesinger :—

(1) Local disease of the organ of sense, (2) a state of deep exhaustion either of mind or body, (3) morbid emotional states, *e.g.*, fear, (4) outward calm and stillness between sleeping and waking

(a) *Animal Magnetism*, p. 224.

p. 464, Note 1.

(b) *Ibid.*, p. 244.

(d) Sully, *Illusions*, p. 117.

(c) Sully, *Outlines of Psychology*,

(*i.e.*, absence of external stimulation), (5) actions of certain poisons, *e.g.*, haschish, opium and belladonna. (a) It would thus seem that hallucination often results from abnormal activity of some kind or other : visualization is hypertrophy of the visual image, and "those who possess such an intense visualization are half under the influence of hallucination, and it is a hundred to one that the hallucination will some day become complete. We may add that very probably visuals are specially predisposed to hallucination of the sight, and consequently to the forms of delirium of which visual hallucinations are the symptom." (b) Similarly those are specially subject to hallucination of hearing in whom the auditory images predominate. (c)

It is hoped that the foregoing sketch of hallucinations will enable the reader to understand their nature, and how they are situated with reference to ordinary mental phenomena, and also assist him to look out for the kinds of persons in whom, and the circumstances under which, hallucinations are to be expected. But before leaving the subject we must anticipate to some extent what we shall be again concerned with when speaking of hypnotism and suggestion, and say a few words on artificially produced hallucinations.

4. Assuming that the use of hypnotism should become more widespread than it is at present—concerning which we shall get a clearer idea later—the employment of hypnotic hallucination may easily become of importance in law. A few quotations will make this plain.

"The subject may be induced to mistake the identity of a person, or to accept the presence of one who is really absent and to recognise his features, voice, &c. The possible consequences of this illusion or hallucination are evident. If an unlawful or criminal act should be committed on the subject, or in her presence,

(a) Sully, *Illusions*, p. 115.

(b) Binet, *Psychology of Reasoning*,

p. 16.

(c) *Ibid.*, p. 23.

an accusation might be made against an innocent person, and it would be maintained with the deepest conviction. The illusion or hallucination might apply to the act itself and would lead to analogous consequences.”(a)

As to hallucinations of memory : “ On the other hand retrospective hallucinations, which are really hallucination of the memory, can also be given. It is for instance impressed upon the subject that at a given moment of his past life he witnessed the commission of a crime by an old man living in the same house with him (Bernheim), and, if the suggestion is clearly defined, the subject’s memory will be as intense and as full of details as if the fact had actually occurred. We can see what grave consequences might ensue from these experiments from a medico-legal point of view.”(b) And again : “ It is possible that a magistrate or physician may, by the persistence of his questions and his authoritative voice, unconsciously give suggestions which modify the subject’s recollections and give rise to hallucinations of memory.”(c) The same would apply to a masterful advocate.

Speaking of the dangers of hypnotism it is said : “ There is still more reason for condemning an enquiry by means of hypnotism. It has been suggested that a suspected or accused person might be hypnotized against his will, in order to obtain from him admissions or information respecting the facts of the accusation. This process, which resembles that of torture, would have the same danger of leading a suspected person to confess crimes of which he is really not guilty,”(d) presumably owing to the force of the suggestions contained in the questions.

It may be thought that the danger is imaginary because the hallucination would disappear when the subject recovered from the hypnotic state, but this is not necessarily so. In subjects affected by profound hypnotism hallucination persists in the waking state, and therefore a conviction of the reality of the hallucination

(a) *Animal Magnetism*, p. 369.

(b) *Ibid.*, pp. 216-7.

(c) *Ibid.*, p. 374.

(d) *Ibid.*, p. 375.

is an essential part of the phenomenon. The hallucination does not consist merely in the external projection of a sensible image, but in the condition of mind which accompanies the projection of this image. Usually no doubt can be infused into the mind of the subject on waking as to the reality of the hallucinatory object, as long as the hallucination remains, though it may be destroyed by suggestion, *i.e.*, by suggesting to him that he has seen or heard nothing. Otherwise the hallucination in time will gradually fade and be spontaneously effaced.

Other modes in which hallucination can be used are, by systematic anæsthesia, *e.g.*, by suggesting to a subject that he is unable to see a given person, by which means a criminal might get rid of a witness : or again by directing him to forget on awaking what has happened, and he will do so.

This is all we can say at present on hypnotic hallucinations without danger of subsequent repetition : discussion of all other points connected with them must be deferred till later.

5. Illusions have already been partly described when distinguishing them from hallucinations, but they need further definition. In the broadest sense of the term they include not merely what are known as illusions of the senses, but also errors which do not counterfeit actual perception : thus a man is popularly said to be under an illusion when he ridiculously exaggerates his own importance, or pictures the past quite otherwise than it is known to have been. As these illusions like those of the senses simulate the form of immediate or self-evident cognition, Professor Sully widely defines illusion as "any species of error which counterfeits the form of immediate, self-evident or intuitive knowledge, whether as sense-perception or otherwise"^(a) while his definition for illusion of sense is as follows :—"An illusion of perception consists in the formation of a quasi-percept which is peculiar to an individual, or which is contradicted by another and presumably more

(a) Sully, *Illusions*, pp. 5, 6.

accurate percept;” or again, it is “a deviation from the common or collective experience.”(a)

The distinctive feature about illusions seems to be that the error is not in the sense organ but in the mind: there is a co-operation of the sense and of the mind, but the sensory impressions are correct. They are what they ought to be, the nature of the external excitant and the state of the sensitive organ being given, the error lies in the mind’s interpretation of the sensation (b), or, as Prof. James describes it, “in every illusion what is false is what is inferred, not what is immediately given. The ‘this’ if it were felt by itself alone, would be all right, it only becomes misleading by what it suggests.” (c)

There is the same difficulty in distinguishing illusions from healthy mental life, as in the case of hallucination: Prof. Sully says. “Illusion constitutes a kind of borderland between perfectly sane and vigorous mental life and dementia”(d), and that it is not essentially an incident in abnormal life, but that hardly any one is always consistently sober and rational in his perceptions and beliefs. “A momentary fatigue of the nerves, a little mental excitement, a relaxation of the effort of attention by which we continually take our bearings with respect to the real world about us, will produce just the same kind of confusion of reality and phantasm which we observe in the insane. To give but an example: the play of fancy which leads to a detection of animal and other forms in clouds is known to be an occupation of the insane, and is rightly made use of by Shakespeare as a mark of incipient mental aberration in Hamlet; and yet this very same occupation is quite natural to children, and to imaginative adults when they choose to throw the reins on the neck of their phantasy.”(e)

Numerous examples showing the like will be given in what follows.

(a) Sully, *Illusions* p. 38.

Vol. II, p. 86.

(b) Binet, *Psychology of Reasoning*, pp. 5, 6.

(d) Sully, *op. cit.*, p. 44

(e) *Ibid.*, p. 2.

(c) James, *Principles of Psychology*,

Illusion is concerned with four kinds of immediate knowledge.

The subject-matter
and Causes of Illu-
sion.

(1) Internal Perception or introspection of the mind's own feelings, (2) External perception.

(3) Memory, (4) Belief, including expectations and other kinds of Conviction not included in (1), (2), and (3).^(a)

Here we shall be mainly concerned with the first two, as Memory and Belief are treated of elsewhere.

Professor James sums up the causes of illusions under two heads: the wrong object is perceived either because (a) although not on this occasion the real cause, it is yet the habitual inveterate or most probable cause of this, (b) the mind is temporarily full of the thought of that object and therefore 'this' is peculiarly prone to suggest it at this moment (b), and with reference to the second cause he says:—"Testimony to personal identity is proverbially fallacious for similar reasons. A man has witnessed a rapid crime or accident, and carries away his mental image. Later he is confronted by a prisoner whom he forthwith perceives in the light of that image, and recognises or 'identifies' as a participant although he may never have been near the spot."^(c)

Wundt expresses it rather differently with reference to assimilation: in those processes of assimilation, he says, which follow directly upon sense-impressions the peripherally excited sensations are so far of influence on the memorial elements that they increase the intensity of the reproduced sensations. When these latter excited by association obtain so exclusive a predominance that the resultant idea is wholly inadequate to the sense-perception, we call it an illusion. In the illusion we imagine we perceive something which is not there, we confuse memorial elements with sense-impressions, and that again is only possible when there is no noticeable difference in the intensity of the two constituents.^(d) Other sources of illusion are (1) Inattention to the sense-impression: this leads to a confusion of

(a) Sully, *op. cit.*, p. 14.

(b) James, *op. cit.*, Vol. II, p. 86.

(c) *Ibid.*, p. 97.

(d) Wundt, *Human & Animal Psychology*, p. 289.

the impression, and thus the timid man will more readily fall into the illusion of ghost seeing because he is less attentive to the actual impression of the moment.

(2) Error in classifying or identifying a present impression, *e.g.*, a sensation of colour is appreciably modified when there is a strong tendency to regard it in one particular way. Novelty acts as a source of suggestion. We exaggerate the intensity of a new sensation, because being strange it has an exciting character, and being unable to classify it with its like we magnify it. All indistinct impressions again are liable to be wrongly classed, *e.g.*, faint colours, impressions from distant objects, and when we specially attend to them we are apt to magnify them as in the case of vague sensations connected with digestion or respiration. (a) There is a general mental law that when we have to do with the unfrequent, the unimportant and therefore unattended to, and the exceptional, we employ the ordinary, the familiar and the well-known as our standard. Whether we are dealing with sensations that fall below the limits of our mental experience or which arise in some exceptional state of the organism, we carry the habits formed in the much wider region of average everyday perception with us. (b) On this depend various misinterpretations of sense-impressions and consequent fallacious conclusions, both passive illusions connected with the process of suggestion as *e.g.*, when the echo of a shout makes us hear two voices because the second auditory impression irresistibly calls up the image of a second shouter, and also active illusions which are connected with an independent process of preperception. Thus a man sees spectres just after exciting his imagination with a ghost story because his mind is predisposed to frame such a percept.

Other instances are the way in which we ignore the limit of our sensibility when it is reached and interpret the impression in the customary way, or we ignore its variation, *e.g.*, taking a

(a) Sully, *op. cit.*, p. 40, *et seq.*

(b) *Ibid.*, p. 68.

room to be brighter than it is when emerging from the dark. An exceptional environment will produce an illusion, *e.g.*, refraction of light, reflection of light and sound, echoes, &c.

There is however a limit to illusion, for there is always some real resemblance in it. "Every time that an illusion lends itself to analysis, it is perceived that the false exteriorized image, which properly speaking constitutes the illusion, in some way resembles that which gives it birth. For example, when by reason of distance or obscurity we take one person for another, or allow ourselves to be deceived by an imperfect resemblance we commit an error of identification: in other words, the first image awakened by the external sensations resembles them and is blended with them."(*a*)

There must also be the actual impression: "in normal circumstances an act of imagination, however vivid, cannot create the semblance of a sensation which is altogether absent: it can only slightly modify the actual impression by interfering with that process of comparison and classification which enters into all definite determination of sensational quality."(*b*)

We shall here conclude all that we have to say about illusions now: though some further remarks concerning illusions of introspection, insight and observation will be found elsewhere under the heads of Introspection and Prejudice. We can make no direct applications of what has been said to law, but the considerations must be applied rather, from time to time, in the estimation of evidence as occasion arises. Although much is familiar already to the man of experience and observation, the study of illusions is not wasted, as we are more likely to correctly judge the probability of evidence if we are aware of the ways in which the observer can be deceived and the circumstances under which such deceptions arise.

(*a*) Binet, *Psychology of Reasoning*,
p. 137.

(*b*) Sully, *op. cit.*, p. 91.

6. It is an easy transition to Hypnotism, the existence of which we take to be undisputed. It is accepted as a fact in all the more modern psychological works, and if any reader now-a-days is inclined to regard it as humbug and imposture we can only advise him to read *Animal Magnetism*, a work much quoted from in these pages, but we cannot stop to argue with him. For there is nothing really wonderful in hypnotism: the hypnotic subject is not governed by special psychological laws, but the germs of all his symptoms can be traced in the normal state: the physical disturbance also caused by suggestion has many characters in common with the spontaneous disturbance found in an insane person, and the hallucination of hypnotism does not essentially differ from the ordinary forms of hallucination. The phenomena are only an exaggeration and pathological deviation.

The fact that hypnotic patients have displayed extraordinary powers of memory, sensation and discrimination, has tended to give hypnotism an air of the marvellous which has led some people to discredit what they hear of it. Those however who have studied the subject explain this by a simple hypothesis which is known as "the principle of *compensation of functions*, according to which the inhibition of the activity of one region is always connected with an increase in the activity of the other inter-related areas. This inter-relation may be either direct neurodynamic, or indirect, vasomotoric. The first is probably due to the fact that energy which accumulates in one region as the result of inhibition, is discharged through the connecting fibres into other central regions. The second is due to contraction of the capillaries as a result of inhibition, and a compensating dilation of the blood-vessels in other regions. The increased blood supply due to this dilation is in turn attended by an increase in the activity of the region in question. In hypnosis it is possible for different regions within the apperception centre itself to be so related that while certain of these regions are partially inhibited, others are correspondingly more open to excitation. in

such states of partial hypnosis the subject may carry out in an automatic way complicated acts, all his other functions seeming to be in a waking state. Or he may show certain psychological activities of clearer discrimination, or strikingly exact recognition, or reproduction of certain particular sensations and feelings to the exclusion of all other forms of activity.”(a)

The method of producing the hypnotic state is either by fatiguing the senses or by acting on the imagination. Thus the sense of sight is excited strongly and suddenly by luminous rays, &c., or there is slight and prolonged excitement through fixing the eye on a brilliant object : similarly the sense of hearing is strongly and suddenly excited by some loud noise, or by some slight and prolonged sound like the ticking of a watch. The senses of smell and touch can also be employed, *e.g.*, by pressure, passes &c. It is not necessary that suggestion should always be present : “a whole series of purely physical agents exist, which prove that sleep can be induced without the aid of the subject’s imagination, against his will and without his knowledge.”(b)

At the same time these cases are rare, and as it is suggestion that is usually employed it will be well to explain what is meant by this term. Suggestion uses ideas and the subject’s intelligence : it consists in introducing, cultivating and confirming an idea in the mind of the subject of the experiment.(c) The states it produces are the results of that mental susceptibility, which we all to some degree possess, of yielding assent to outward suggestion, of affirming what we strongly conceive, and of acting in accordance with what we are made to expect.(d)

Professor James notes that the power of suggestion is insignificant unless the subject is first thrown into the trance-like

(a) Wundt, *Outlines of Psychology*, p. 306. The account of hypnotism in the text is practically that of Binet and Féré given in *Animal Magnetism*, except where other authors are speci-

fically quoted.

(b) *Animal Magnetism*, p. 96.

(c) *Ibid.*, p. 184.

(d) W. James’s, *Principles of Psychology*, Vol. II, p. 599.

state, but after that there are no limits to its power : this state has no particular outward symptoms, as the bodily phenomena which are called such are really the products of suggestion, but these suggestions could not have been made successfully without the trance state. However this may be, there are as many forms of suggestion as there are modes of entering into relations with another person. Spoken or written suggestion is the simplest, but gestures can be employed and, though less precise in meaning, suggestion by their means is more intense : several ways can also be combined. In what is known as auto-suggestion the suggestion has its origin in the subject's intelligence : instead of being the result of an external impression, as in the case of verbal suggestion, it results from an internal impression, such as a fixed idea or delirious conception. These are often derived from hallucinations. Again, suggestion may produce either an active or impulsive phenomenon, such as a sensation of pain, an act, &c., or a phenomenon of paralysis, *e.g.*, loss of memory, anæsthesia : there are different psychological explanations of these two states ; in the former association of ideas is used, in the latter it is supposed that the experimenter produces a mental impression which has an inhibitory effect on one of the sensorial or motor functions.

Unconscious suggestion is almost always in cases of somnambulism—a name given to the state opposed to the lethargic and cataleptic—and occurs when the subject hears something which the experimenter says or sees some preparation which he makes or even remembers a past experiment.

In all kinds of suggestions one idea is made predominant in the subject's mind and there is an absence of all inhibitory influences.

Suggestion to a person awake and in normal health only produces an idea of the phenomenon not the phenomenon itself ; to succeed the subject must be either spontaneously or artificially in a morbid state of receptivity(*a*). For this the following

Who are liable to
suggestion.

(*a*) Animal Magnetism, p. 176.

conditions are required :—(1) the mental inertia of the subject ; the field of consciousness must be completely vacant. Then as there is no obstacle—neither the power of arrest nor that of antagonism—the idea suggested dominates the sleeping consciousness, or (2) psychical hyperexcitability causing aptitude for suggestions. If the idea suggested exerts an absolute power over the intelligence, the senses and movements of the hypnotised subject, it is especially due to its intensity. When under the influence of alcohol, haschish, opium &c., liability is evinced.(a)

With respect to the possibility of influencing normal subjects, the following may be quoted :—“ the possibility of making suggestions to normal subjects must, however, be admitted if, as one of the present writers has done, we refer suggestion to the act of attention. When attention is sufficiently intense the period of re-action may disappear, and may even become negative, that is, re-action may precede the excitement. An intense mental representation, whether arising spontaneously or induced by suggestion, may therefore produce a re-action irrespective of any excitement.”(b)

Professor James states that “ all ages above infancy are probably equally hypnotizable as are all races and both sexes. . . . native strength or weakness of ‘ will ’ have absolutely nothing to do with the matter. . . . Some experts are of opinion that every one is hypnotizable essentially, the only difficulty being the more habitual presence in some individuals of hindering mental pre-occupations, which, however, may suddenly at some moment be removed.”(c) According to the statistics he quotes a very small percentage of persons are not liable to hypnotization, *e.g.*, 92% are, 700 out of 718 are, and 80% the minimum. Idiots are known to be very difficult to hypnotize, because they have no power of attention.

There seems little doubt that the effect of repetition in hypnotism is very great : the first attempt usually fails, but though

(a) *Animal Magnetism*, p. 177.

Médical, p. 741, 1886.

(b) *Ibid.*, p. 178, Ch. Féfé, Progrès

(c) *James, op. cit.*, Vol II, pp. 594-5.

the subject declares that he has experienced nothing, the attempt has impressed a permanent modification on his nervous system, which renders subsequent attempts more easy. "We readily admit that artificial sleep may be produced in any subject by repeating, varying and sufficiently prolonging the attempts, so as to induce fatigue."(a) With those who have been long under treatment the hypnotic sleep is produced with alarming rapidity; a single abrupt gesture, in any place and at any time will sometimes suffice and the subject can be instantaneously awakened. In fifteen seconds a subject has been thrown into lethargy, then into somnambulism, an act suggested, and then awakened. It is also marvellous how readily such persons will grasp the experimenter's meaning.(b)

Power of resistance
to Hypnotism.

7. We must next discuss the important point whether a person can be hypnotised without his consent or even against his will.

In the case of a person who has never been hypnotised before the capacity to exercise resistance depends on the individual; it varies with the individual just as muscular force varies. If he is not very susceptible to hypnotism, his consent and even his good will are necessary, but in persons excessively susceptible, resistance is slight and they may be taken by surprise and even receive dangerous suggestions without being put to sleep. The authors of *Animal Magnetism* quote a well-known case of a girl hypnotised by a beggar called Castellon, who left her father in order to follow him, although regarding him with terror and disgust, and remained in his power four days, during which time he outraged his unhappy victim several times.(c) If the subject has been hypnotised, even if he knows that he is to be hypnotised and desires to resist, the resistance will often be in vain; or if the thing suggested is too repugnant, he may strenuously resist and get nervously excited to the point of an hysterical attack.

(a) *Animal Magnetism*, p. 100.

(b) *Ibid.*, p. 103.

(c) Despine, *Etude Scientifique sur le Somnambulisme*, 1880.

One can, by suggesting that certain persons shall never hereafter be able to put a man to sleep, remove him for all future time from hypnotic influences which might be dangerous,^(a) or if a fixed idea, *e.g.*, that he will not sleep is artificially developed, it forms an almost complete obstacle, or again the experiment may fail because the operator does not give the order with sufficient authority.

A further question is how much spontaneity exists in the hypnotic state. The subject is capable of reflecting and reasoning and under the influence of suggestion will himself invent expedients which were not suggested to him, to carry out the order; also on awaking he imagines his acts were spontaneous and invents reasons of his own for doing them. "Subjects in this condition," says Prof. James, "will receive and execute suggestions of crime, and act out a theft, forgery, arson or murder. A girl will believe that she is married to her hypnotiser, &c. It is unfair, however, to say that, in these cases, the subject is a pure puppet with no spontaneity. His spontaneity is certainly not in abeyance so far as things go which are harmoniously associated with the suggestion given him. He takes the text from his operator; but he may amplify and develop it enormously as he acts it out. His spontaneity is lost only for those systems of ideas which *conflict* with the suggested delusion. The latter is thus "systematized:" the rest of consciousness is shut off, excluded, dissociated from it. In extreme cases the rest of the mind would seem to be actually abolished and the hypnotic subject to be literally a changed personality."^(b)

As regards the testimony of hypnotised persons as to what happened to them in the hypnotic state, it must first be remarked that after waking the subject is still liable to suggestions, which will last if he has been told that he will still see the object, &c., when awake. Though he remains

Value of the statements of persons who have been hypnotised.

(a) James, *op. cit.*, Vol. II, p. 614..

(b) *Ibid.*, p. 605.

influenced by the hypnotic suggestion, it appears to him to be spontaneous, and he does not remember how the hallucination was produced, nor who gave him the order, nor even that it was given at all ; he will proceed to carry out an act, which he has been told to do, and if asked why he does so, will reply that he does not know or will invent some reason.

A subject's statement as to the time he has been in the hypnotic sleep can rarely be accepted ; he cannot measure the time as he has no landmark. Nor do the subjects know how often they have been hypnotised, though they sometimes have a general impression about it caused by an impression of cold and shivering. This, however, is not always present and it can be destroyed by suggestion. Sometimes oblivion as to what occurred during the sleeping state is complete, sometimes partial, sometimes the events which occurred during hypnosis recur to the mind with great force, when they are recalled by some external circumstance. No rule can be laid down as there is every variety of case from the most profound oblivion to the most lucid recollection. If the hypnotiser tells the patient that he will remember nothing on awaking, this suggestion will destroy the subject's recollection of all that has occurred ; he may even undergo all sorts of violence and have no remembrance of it. The subject who says he remembers everything cannot be trusted ; if he find, *e.g.*, that he has a wound he is apt to invent an explanation or accept one given him, but in all cases he ends by suggesting to himself that he saw things as he has explained them. Or again he may err because of the suggestion of the experimenter who has impressed upon him a recollection which is false.

If, however, the subject is hypnotised anew, the recollection of all which occurred during the former hypnosis is then revived, if he has received no special suggestion of oblivion ; it has been shown, however, that subjects while in a hypnotic state are capable of simulation and of suppressing the truth.

8. Finally we must speak of hypnotism as a defence and the responsibility of the hypnotic criminal, If a man pleads that he acted under the influence of a suggestion given him while in the hypnotic state it must first be proved by experiment that he is susceptible to hypnotism; that is, he must display its usual physical phenomena. Thus hallucinative vision is modified by optical instruments like actual vision, motor paralysis produced by suggestion is accompanied by the same physical signs as a paralysis due to organic causes; so with colour contrasts, &c. A man cannot invent these characteristics as a whole, through want of knowledge and of power; it has, however, been suggested that possibly the very simulation by giving the subject the idea (*e.g.*, of a paralysis) if sufficiently intense, might produce the same effects as suggestion itself; for experiments have shown that some subjects can voluntarily create, modify, and destroy effects on themselves comparable to those developed by suggestion.

The accused person who sets up this defence may sometimes be profitably examined at a time when he displays all the physical characteristics peculiar to the somnambulist state, so that there is no danger of imposture.

“Some of our subjects are aware of the power of suggestion and when absolutely resolved to commit an act for which they fear that their courage or audacity may fail when the moment arrives, they take the precaution of receiving the suggestion from their companions”(a) say the authors of Animal Magnetism, and they seem to be further of opinion that where a man is suspected of making a false deposition dictated by hypnotic suggestion, it would be sufficient to prove the fact of the suggestion, as individuals cannot be constrained against their will to submit to hypnotisation, a point which we have discussed above. Or at all events strict enquiry should be made as to why

(a) Animal Magnetism, p. 373.

the man consented to be hypnotised², unless this was done suddenly or by force or by guile; for even if he was not aware of the experimenter's purpose, he incurs some responsibility for having voluntarily alienated his free will, much more so if he knew for what criminal act it was proposed to employ him. "It is possible that a subject susceptible to hypnotism might be found in a band of swindlers or murderers who would willingly become the recipient of criminal suggestions. We can readily understand the use of suggestion in such circumstances, since those who act under the influence of hypnotic suggestion display more daring and courage, and even more intelligence than when they act from their own impulse."(*a*)

They suggest that though subjects who have been hypnotized without their consent or when taken by surprise and have then received suggestions and commit criminal acts, incur no moral responsibility, they are so dangerous to society that they should be treated as insane criminals.

It is recognised² that hitherto suggestion has been but little employed for criminal practices, but as its uses become better known this need not continue to be so. The writer has some reason to think that a case which came before him in about 1896 may have been really explicable in this way, though he was not then sufficiently acquainted with the subject to suspect it. The charge as brought by the police was that of administering some stupefying drug to a Shan, by other Shans, and inducing him to gamble away all his money while in a dazed condition; as it could not be proved that any such drug was administered, nor could the complainant recollect taking anything, the case fell through, yet there was evidence to show that the man exhibited the symptoms of what now appears to have been hypnotic trance and seemed to hand over his money without really understanding what he was doing.

(*a*) *Animal Magnetism*, pp. 375-6.

CHAPTER XIII.

IDENTITY—SIMILARITY—COMPARISON OF HANDWRITING.

The expression 'same transaction' in Law—Tests of it as laid down in the decisions unsatisfactory—The nature of Identity discussed—Diversity required in order to be aware of identity—There is no such thing as sameness generally but we must specify in what respect things are identical or different—We determine this respect according to our practical interest—There is no identity of mere existence but all identity is qualitative—The relation of Similarity to Identity—Ambiguity in the use of the word 'same'—Identification by photographs and portraits—Comparison—Comparison of handwriting—Identification by General knowledge of handwriting—By comparison of two or more writings—To what extent writing is reflex action—The value of such evidence unduly minimised by legal writers.

Identity and Similarity. Meaning of 'same transaction.'

THERE is a conception of frequent occurrence in law of the meaning of which a clear understanding seems needed. We allude to 'Identity' or 'Sameness,' and in order to ascertain exactly in what it consists it will be necessary at the same time to discuss another conception to which it is intimately related, *viz.*, that of 'Similarity' or 'Likeness.'

It is provided in the Criminal Procedure Code that a number of offences may be tried together at one trial if they were committed in one series of acts so connected together as to form the same transaction (*a*) : when however an attempt is made to define what the words 'same transaction' mean various tests are suggested and Courts often do not agree as to whether the series of events dealt with did or did not constitute the same transaction. It has been said that it cannot be the same transaction if the alleged offences are separated by distinct intervals of time

(*a*) Criminal Procedure Code, s. 235.

or place (a) and again that there must be a causal connection between them (b), but we submit not only that these tests are wrong in themselves, if intended to be used as exclusive tests, but that on the true view of causation, as explained in our chapter on that subject, they are mutually inconsistent. For it is not necessary in order to have the causal relation that the cause should immediately precede the effect, and therefore we may have causality although two events are separated by distinct intervals of time or space or both. This same idea of juxtaposition in time as necessary to constitute the same transaction may be found elsewhere: thus it is said, speaking of the presumption of advancement, that "the advancement of a son even is a mere question of intention. Therefore, facts antecedent to or contemporaneous with the purchase, or *so immediately after it as to constitute a part of the same transaction*, may properly be put in evidence for the purpose of rebutting the presumption . . . but the acts and declarations of the father subsequent to the purchase, although they may be used in evidence against him by the son, cannot be used by the father against the son." (c)

Other passages, however, can be cited even in law which do not seem to contemplate such a juxtaposition. With reference to contract and the rule that a past consideration, if given at the request of the promisor, will support a subsequent promise, it is asked in Anson's Law of Contract "Is any limit to be assigned to the time which may elapse between the act done upon request and the promise made in consideration of it?" And the author concludes "that unless the request is virtually an offer of a promise the precise extent of which is hereafter to be ascertained, *or is so clearly made in contemplation of a promise to be given by the maker of the request, that such a promise may be regarded as a part*

(a) Prinsep's Commentary on the Criminal Procedure Code, 13th Edn., p. 237.

b) Ameer Ali and Woodroffe's 2nd

Edn. of the Indian Evidence Act, p. 59.

(c) Snell, Principles of Equity, 13th Edn., p. 108.

of the same transaction, the rule in *Lampleigh v. Braithwait* has no application.” (a)

Again s. 6 of the Indian Evidence Act runs : “ Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, *whether they occur at the same time and place or at different times and places.*” Here it seems to be distinctly contemplated that facts which occurred at different times and places may form part of the same transaction and it is therefore the more surprising that any judge should lay it down that events separated by distinct intervals of time or place do not belong to the same transaction.

“ A transaction,” says Sir James Stephen, “ is a group of facts so connected together as to be referred to by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue,” and he goes on to add :—

There is no one test of what constitutes the same transaction.

“ whether any particular fact is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single judges have given different decisions.” (b) Whether the lawyers are still waiting for some principle to be stated for their guidance we do not know, but we are convinced ourselves that no one principle can be used as a test, and that no better rule on the whole can be given than that of Convenience. That is to say that those events are to be regarded as belonging to the same transaction which the magistrate finds convenient to treat as such for the purpose which he has in hand. Next to this principle we should place Motive or similarity of motive, *i.e.*, that all acts done with reference to the same motive, or which serve the same purpose or end of action, may legitimately be regarded as of the same transaction. Thirdly, we should place causal connection, and, fourthly, the contiguity of acts in time and space : there may be others also

(a) Anson's Law of Contract, 8th Edn., p. 79.

(b) Stephen, Digest of the Law of Evidence, Art. 3.

which have not occurred to us. Why we have adopted this view will become apparent in the discussion of 'Identity' and 'Similarity' which we shall now enter on.

2. In trying to arrive at the nature of Identity we are forced to a certain extent to discuss Metaphysics :
The nature of Identity discussed. this is unavoidable, and it is the neglect of what Metaphysics teach which has in our opinion led to the confusion and contradictions on the subject which exist in the law.

We shall begin by insisting on a few propositions : *viz.*, (1) that you cannot be aware of identity unless you have also diversity : (2) that you cannot ask whether a thing is generally the same, but you must confine your questions to a certain aspect of it : (3) that we select that aspect to suit our interests, and such interests are usually practical : (4) that identity or the relation of sameness is ideal, it lies in the view we take of things and not in the nature of things themselves : (5) that the word 'same' is used ambiguously and that it is a different problem when we ask whether an individual remains the same, and when we ask whether two things are the same.

The first proposition applies whether we are speaking of the
Diversity required in order to be aware of identity. resemblance of two things or of the continuous identity of one. "In order that the mind may perceive the resemblance between two images," says Binet, "they must differ a little ; if they do not, they become added together and form a single image"(a), and similarly Lotze writes "we should know nothing whatever of this fact, the reproduction of a former a by the present A, if the two were simply present, with no distinction between them at the same time. To know the present A as repetition of the former a, we must be able to distinguish the two ; and we do this because not only does the repeated A bring with it the former one which is the precise counterpart, but this

(a) Binet, *Psychology of Reasoning*, p. 120.

former one also brings with it the ideas c, d, which are associated with it, but not with the present A, and thereby testifies that it has been an object of our perception on some former occasion, but under different circumstances.”(a)

To the same effect Prof. Sully writes:—“The visual recognition of a thing as identical with something previously perceived takes place by help of the idea of persistence . . . (it involves) the comparison of successive impressions and the detection of similarity and diversity of change. Thus a child learns to recognise his hat, &c., by discounting a certain amount of dissimilarity.”(b)

Let us apply this to the idea of a series, which is closely bound up with the notion of ‘same transaction’: it is evident that we must have the conception of a succession and of the persistence of something through that succession, and in order that we may say that it remains identical or the same throughout, we must contrast it with the surrounding circumstances which do not persist but change. The question is where this persistence lies, is it in the object or in the mind of the perceiver or in both ?

Speaking of succession Mr. Bradley says “without an identity, to which all its members are related, a series is not one, and one is therefore not a series. In fact, the person who denies this unity, is able to do so merely because he covertly supplies it from his own unreflecting mind,” and he concludes that there is an actual succession entering into the very apprehension and an actual mental transition: that succession requires both diversity and unity which cannot intelligibly be combined and when we appear to do so, it is only by oscillating from one aspect to the other and not noticing at the time the one to which we are not attending.(c)

If the persistence is in the object itself this implies a sameness of character attaching to the thing itself, *i.e.*, a qualitative sameness, and further the avoidance of any absolute break in its

There is no such thing as sameness generally.

(a) Lotze, *Metaphysic*, Bk. III,
Ch. II.
(b) Sully, *Outlines of Psychology*,

p. 155.

(c) Bradley, *Appearance & Reality*,
pp. 49—52.

existence : when however it is asked in what the sameness of quality consists, it will be found that no reply can be given, unless the point or particular respect of which you were thinking is specified. A general reply cannot be given because we do not know the general character which is taken to make the thing's essence : it is not always material substance, nor shape, nor size, nor colour. The identity lies really in the view we take of it, and that view is often a mere chance idea : the character therefore lies outside of and beyond the fact taken.(a)

And again, "in enquiries about identity it is all important to be sure of the aspect about which you ask. A thing may be identical or different, accordingly as you look at it : " you must ask if a man is identical in this or that respect, for one purpose or another purpose, to speak of General Sameness is meaningless.(b)

How then do we determine in what respect we shall ask of a thing whether it is the same or not ? Prof. Stout seems to have answered this question in his remarks on what he calls 'thinghood.' It depends on interest : we take what answer for practical purposes as real, identical, &c. : on the perceptual level this interest is purely practical. It is the interest of the moment which determines how we look at a thing, and we look at it differently according to the fluctuation of interest.(c)

And this is why we say that the rule of convenience is the one to be followed in deciding whether events belong to the same transaction or not. Our interest here is solely as to how we shall dispose judicially of the charges brought against the accused in the most convenient manner, and the considerations which chiefly influence us are whether the same witnesses can speak to all the charges and whether those charges can be kept separate before the mind without risk of confusion or prejudice, if they are taken together. The fact that the events happened at different times and places and such like reasons are irrelevant in themselves save

(a) Bradley, *Appearance & Reality*, pp. 73-4.

(b) *Ibid.*, pp. 85-6.

(c) Stout, *Manual of Psychology*, pp. 327. *et seq.*

in so far as they hinder or promote our convenience, and in one respect the more distinct the events are in regard to time and place the more easily we can try such charges at one trial, as their very distinctness lessens the risk of confusing them. But to seek to convert such reasons into an objective general test of identity and difference seems to us both meaningless and irrational.

3. The attempt to lay down such tests as the causal connection, continuity in time and space and the

There is no sameness of mere existence: all identity is qualitative.

like is really due to the fallacious idea that you can have identity of mere existence.

It is doubtless difficult for the legal mind to grasp it, but it is none the less true that mere existence is a vicious abstraction: all identity is qualitative in the sense that it must consist in content and character, *(a)* and how that character is determined has already been stated. From this it follows that what is identical in quality must always be one, and its division in time or space does not take away its unity. An interval of disappearance is not fatal to its identity, for it is not identical by reason of continuity in time but because its quality has not changed, and the amount of qualitative sameness required is limited by no fixed principle. *(b)*

And if we attempt to regard breaks in the temporal series as the criterion of identity we are at once faced with the difficulty that we cannot demand absolute continuity in time or space, for common sense refuses to accept such a test and regard as unconnected events separated by insignificant intervals which yet appear to be otherwise related. Nor though we may speak of 'distinct' intervals can we lay down any limit as to what the length of the interval must be, and if we attempt to avoid the difficulty by vaguely saying that the interval must not be too long, having regard to the circumstances of the particular case, apart from the fact that this is merely shirking the point, we have no grounds even for such a statement.

(a) Bradley, *op. cit.*, p. 587.

(b) *Ibid.*, pp. 211, 310, 313-4.

This seems to be the attitude adopted, *e.g.*, in the following passage from Snell's work on Equity; "Also, as regards constructive notice through a man's Solicitor or Counsel, if it is desired by such notice to affect in equity their several principals, the notice must be of something which the Solicitor or Counsel could be reasonably expected both to remember and to mention; and it is commonly said, therefore, that the notice must have been given or imparted to them in the same transaction,—although if one transaction be closely followed by and connected with another, then the second transaction may be considered the same transaction, *if it be reasonable so to consider it.*"(a)

This passage is not very clear: the position is that there are two transactions, and therefore they are not one though described as connected. So long as they remain two how they can be the same, is not intelligible, but apparently on the ground of juxtaposition in time and connection they are to be united in one, if it is reasonable to do so. Such platitudes are useless, what is wanted is a statement of what kind of connection is required to justify their combination, or under what circumstances they are considered to be connected. If however by the words 'if it is reasonable to do so,' is practically meant 'if it is convenient for the purpose in hand to regard them as the same transaction', we then welcome this application of the rule of convenience: in any case we quote the passage because it seems to imply that the test of the identity is the view taken of the events by the judge and not any intrinsic condition of the events themselves.

That the causal relation is sometimes a good test inasmuch as cause and effect can hardly be treated as anything but one transaction, is not denied: but it cannot be adopted as an exclusive test or a necessary condition. As such it would exclude unnecessarily the joinder of charges which under the rule of convenience might well be taken together, and it is further unsatisfactory because as a subjective experience we sometimes cannot trace the

(a) Snell, *Principles of Equity*. 13th Edn., p. 320.

direct causal relation, though it may nevertheless be there the whole time, as we may be aware ourselves.

A good instance of a perverse and inconvenient ruling due to a wrong notion of identity is that of *Empress v. Bishnu*.^(a) In that case three men were charged with theft of certain property and a fourth man with dishonestly receiving the same property, and it was held that they could not be tried at one and the same trial because the two offences were not committed in the same transaction. The judges remarked:—“The offence of dishonestly receiving stolen property from a person who has stolen that property cannot be regarded as an offence committed in the same transaction as the theft itself, unless it be in a case where simultaneously with the offence of theft the offence of receiving stolen property is committed.” We doubt whether this decision commends itself to any one but the advocate who is at his wits’ end what to say for his client on appeal, but, being based as it is simply on the erroneous ground that identity is equivalent to continuity in time, we would gladly see it dissented from or consigned to oblivion for the future.

4. The relation of Similarity to Identity will now be described. “Similarity,” says Mr. Bradley, “is nothing in the world but more or less unspecified sameness.” “The feeling that two things are similar need not imply the perception of the identical point, but none the less this feeling is based always on partial sameness,”^(b) and elsewhere he says that Resemblance is the perception of the more or less unspecified identity of two distinct things. It differs from identity in its lowest form, *i.e.*, where things are taken as the same without specific awareness of the point or sameness and distinction of that from the diversity, because it implies the distinct consciousness that the two things are two and different. It differs again from identity in a more explicit form because it is of the essence of Resemblance that the

Similarity. How
related to identity.

(a) 1 Calcutta Weekly Notes, p. 35.

(b) Bradley, *op. cit.*, p. 348 and note(1).

point or points of sameness should remain at least partly undistinguished and unspecified. And further the feeling which belongs to the experience of similarity is different from that which belongs to the experience of sameness proper. But resemblance is based always on partial sameness, though the specific feeling of resemblance is not itself the partial identity which it involves, and partial identity need not imply likeness proper at all.(a)

The writer is aware that this view is disputed by more than one philosopher: they hold that Resemblance is not based on Identity, but is an ultimate idea, or even that Identity is based on Resemblance. Thus Binet writes, "to explain the resemblance between two states of consciousness by the *common* elements in the two states or by a partial *identity* of their elements, simplifies nothing at all. For it replaces the idea of resemblance by the ideas of identity and unity which are merely its derivatives. Resemblance is a single, ultimate and irreducible idea"(b). Similarly Professor James says "so here any theory that would base likeness on identity, and not rather identity on likeness must fail," again "likeness must not be conceived as a special complication of identity but rather that identity must be conceived as a special degree of likeness, . . . likeness and difference are ultimate relations perceived. As a matter of fact no two sensations, no two objects of all those we know, are in scientific rigour identical. We call those of them identical whose difference is unperceived. Over and above this we have a *conception* of absolute sameness, it is true, but this, like so many of our conceptions, is an ideal construction got by following a certain direction of serial increase to its maximum supposable extreme. It plays an important part among other permanent meanings possessed by us in our ideal intellectual constructions. But it plays no part whatever in explaining psychologically how we perceive likenesses between simple things."(c)

(a) Bradley, *op. cit.*, pp 592-3.

(b) Binet, *op. cit.*, p. 129.

(c) W. James, *Principles of Psychology*, Vol. 1, pp. 532-34.

We remember to have read in a judgment of one of the Indian High Courts (unfortunately we cannot now give the reference) that the judges considered the case was not proved because the evidence only established likeness and not identity, and it is no uncommon thing to hear evidence given that a witness can swear that two things or two persons are very ^{much} like, but he will not swear that they are the same : such testimony is usually considered to fall short of an identification. Now if identity is based on resemblance, what more is required than the assertion that two things are very like ? It is the fact that such questions arise in law that is our excuse for pursuing this controversy concerning Resemblance and Identity a little further. The position of the one side is that Identity is nothing more than a special degree of resemblance with the difference between the two objects unperceived : the contention of the other is that all resemblance is partial identity, but the points of sameness are not fully specified, and that terms such as 'exact likeness' 'precise similarity' are misleading. For as soon as you have removed all internal difference, and resemblance is carried to such a point that perceptible difference ceases, then you have identity. As soon as you begin to analyse resemblance you get something else than it, and when you argue from resemblance, what you use is not the resemblance but the point of resemblance, and a point of resemblance is clearly an identity.(a)

The physiological explanation, when one state of consciousness is said to revive a similar state, doubtless is that the two similar states have a numerically single nerve element as their basis: the two images put a common cell element in vibration (b) and this is called an identity of seat. This appears to us to point to identity being the ultimate state, but for the purpose of our discussion it seems clear that, what is really the important matter is the amount of difference which is perceived, and we think that in most cases when a witness is able to swear to great likeness

(a) Bradley. *op. cit.*, p. 595.

(b) Binet, *op. cit.*, pp. 125. 126.

between two objects or persons and can specify the points of likeness, in the absence of any specified points of difference it should be accepted as an identification even though the witness shrinks from using that term. If an advocate persists in asking "Will you swear that they are the same?" Many witnesses will answer no, and on paper and to the unreflecting mind this will considerably weaken the effect of the evidence. Such an advocate should be asked in his turn to define what he means by 'same,' and if he attempts to do this it will soon become apparent that his question as so addressed is not one that can be fairly given the direct answer 'yes' or 'no.' If the witness attempts to give any other response he is often charged with prevarication, whereas it is not his fault that he does so, but the form of his interrogator's question compels him to do it. In a case, *e.g.*, of the identification of stolen goods, the magistrate should not be influenced so much by the use of the words 'like' and 'same,' but should rather get from the witness the points in which he is able to say that the objects correspond and those in which he is able to say that they differ.

"Two objects are similar," says Wundt, "when certain of their characteristics correspond, while others are different," and perfect likeness—to indicate which the term 'identity' is sometimes used—whether of quality or of intensity, must be estimated for practical purposes by indistinguishableness when attention is closely directed to the two objects.(a)

5. At the same time it must be remarked that difference is not always fatal to identity, but here we are using 'identity' in another sense. A quotation will explain this: "Real identity," says Dr. Ward, "no more involves exact similarity than exact similarity involves sameness of things; on the contrary we are wont to find the same thing alter with time, so that exact similarity after an interval, so far from suggesting one

Ambiguity in the
use of 'same.'

(a) Wundt, *Human and Animal Psychology*, p. 291.

thing, is often the surest proof that there are two concerned. Of such real identity then, it would seem we must have direct experience; and we have it in the continuous presentation of the bodily self; apart from this it would not be 'generated' by association among changing presentations. Other bodies being in the first instance personified, that then is regarded as one thing from whatever point of view we look at it, whether as part of a larger thing or as itself compounded of such parts—which has had one beginning in time.”(a)

The same writer points out the ambiguity in the word “same” whereby it means either individual identity or indistinguishable resemblance: in the former we have mere oneness or singularity which entails no relation, in the latter there is a relation, for two individuals partially coincide.

This individual identity cannot be established solely by qualitative comparison; an alibi or a breach of temporal continuity will turn the flank of the strongest argument from resemblance. Moreover resemblance itself may be fatal to identification when the law of being is change.(b)

Similarly Mr. Hobhouse writes that Identity as meaning precise or exact resemblance must not be confused with that kind of identity which we predicate of one thing in two relations, or of one person at different periods of his life. In continuous identity it is a kind of numerical identity that is asserted, and neither does complete resemblance prove continuity nor continuity complete resemblance.(c)

It is hardly necessary to concern ourselves further with this meaning of the term, though we have a few more remarks to make on the subject of Identification. One method of identification allowed in law is by showing the photograph of a person to

(a) J. Ward, Art., Psychology Encyc. Brit., 9th Edn., Vol. XX. pp. 56-7.

(c) Hobhouse, Theory of Knowledge, pp. 117-120.

(b) *Ibid.*, p. 81.

the witness "A photographic likeness may often be used for the purpose of identification : this is constantly done in actions for divorce, and has been even allowed in a criminal trial," *a*) and witnesses have also been permitted to identify by a portrait. In the case of *R. v. Tolson*, 4 F. & F., 104, a photograph in a trial for bigamy was shown to two persons to identify on the ground that it was a permanent visible representation of the image made on the minds (the retinas of the eyes) of the witnesses by the sight of the person represented, so that it was "only another species of the evidence which persons give of identity, when they speak merely from memory." (*b*)

This reason does not appear to us to be correct : no photograph corresponds entirely to the mental image which we have of a man, but only contains certain elements which are the same. These elements not merely revive those corresponding to them in the image, but they further revive others which do not correspond but which were contiguous with the like ones in the past, and it is this whole often made up of many representations of the individual which is the mental image that we have of the person. It is a case of association of ideas both by similarity and contiguity, and not by similarity alone as the dictum quoted above implies. Hence Prof. Stout when explaining the uncertainty of revival says, "The points of difference in the given presentation pre-occupy consciousness and have preformed associations of their own. The points of identity can only reproduce their contiguous associates by partially or wholly displacing the setting in which they are embedded in the given presentation, and by overcoming the reproductive tendencies which attach to this presentation as a whole and to its specific constituents. In order that such obstructions may be overcome the points of identity must have peculiar interest or impressiveness, or their preformed association must in some other way be peculiarly favoured, *e.g.*, by frequent

(*a*) Ameer Ali and Woodroffe's 2nd
Edn. of the Indian Evidence Act.
p. 324 & p. 379, note 5.

(*b*) Roscoe, Digest of the Law of
Evidence in Criminal Cases, 9th
Edn., p. 146.

repetition, or by the general direction of mental activity at the moment.”(a)

In short the function of photographs, portraits and the like is to call up not any image of the person as seen on one particular occasion but the general idea or generic image that we have in our mind, and how that idea is formed has already been discussed in the Chapter on the theory of the normal man. When therefore in the case of *Fryer v. Gathercole* (b) Parke, B., said “In the identification of persons you compare in your mind the man you have seen with the man you see at the trial. The same rule of comparison belongs to every species of identification,” the statement does not appear sufficient, for the words ‘the man you have seen’ do not adequately describe the nature of the mental image employed. Nor do you compare generally : just as you must ask whether

Comparison.

a man is identical in this or that respect (*vide supra*, para. 2) so you always compare in some special respect. Some theoretical or practical end is to be subserved by the comparison which takes place only in regard to the characteristics which happen to be interesting at the moment, other characteristics being set aside or disregarded as unimportant.(c) This explains why persons often fail to observe suspicious facts or draw what appear to be obvious inferences. They do not make the necessary comparisons because they have not the necessary interest at the time : after they have been cheated interest is aroused and in retrospect it looks very different. But judges overlook this and regarding the matter after the event draw the conclusion that the complainant consented, was an accomplice, &c.

6. Comparison of handwriting and identification by it next claims attention. Only two methods will be here considered, *viz.*, that by which an admitted specimen of the person’s handwriting is placed side by side with the

Comparison of
handwriting. Ident-
ification by general
knowledge of.

(a) Stout, *Analytical Psychology*,
Vol. I, pp. 277-8.

(b) 13 Jur., 542.

(c) Stout, *Manual of Psychology*, p. 474.

handwriting in dispute, and compared by an expert, the jury, or the judge; and that by which a person who is acquainted with the handwriting of the individual through having seen it on previous occasions, is shown a writing in court and is asked to say from his general knowledge whether it is or is not that individual's handwriting. The methods are different: in the latter, which will be first discussed, the witness identifies the handwriting by reference to some general standard which exists in his mind. It is this which is alluded to by Best in the following terms:—"A standard of the general nature of the handwriting of the person may be formed in the mind by having, on former occasions, observed the characters traced by him while in the act of writing, with which standard the handwriting in the disputed document may, by a mental operation, be compared. Secondly, a person who has never seen the supposed writer of the document write, may obtain a like standard by means either of having carried on written correspondence with him, or having had other opportunities of observing writing which there was reasonable ground for presuming to be his." (a)

It is then said that having seen the party write only once, no matter how long ago, or having merely seen him write his signature, or even only his surname is sufficient to render the evidence admissible: and again, that the number of papers which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the admissibility of the evidence. (b) This is as to the admissibility, but as regards the value of the opinion it would clearly vary very much with the number of papers which the witness had seen in the handwriting of the person, and hence Holroyd, J., is reported to have said in the case of *Sparrow v. Farrant* that in order to make ancient signatures available for the purpose of proving similitude of handwriting, a witness should be produced who is able to swear from his having examined *several* of such signatures, that he has a *sufficient* knowledge of the

(a) Best on Evidence, § 233.

(b) *Ibid.*, §§ 234-5.

handwriting to be able, *without an actual comparison*, to state his belief on the subject.(a)

This decision seems to have been so far dissented from in the case of the Fitzwalter peerage (b) that Lord Brougham there said that they ought not to allow a person to say from the inspection of the signatures to two or three documents that he could prove the handwriting of the party, though a witness was properly allowed to speak to a person's handwriting from inspection of a number of documents with which he had grown familiar from the frequent use of them.(c) The point that we are here interested in is, what is this general standard in the mind by means of which the witness is said to recognise a particular handwriting without actual comparison? By 'actual comparison' we take it to be meant that there is no visual comparison of two specimens present in Court, but there is a comparison with a standard previously created in the mind *ex visu scriptiois* or *ex scriptis olim visis*, as the lawyers say.(d)

Difficulties have been made as to refreshing memory in such cases: thus Best writes:—"It has been made a question whether a witness who, either *ex visu scriptiois* or *ex scriptis olim visis*, has acquired the knowledge of the handwriting of a party, but which from length of time, has partly faded from his memory may be allowed, during examination, to refresh his memory by reference to papers or memoranda proved to be in the handwriting of the party. In one case a witness was allowed to do so by Dallas, C. J., at *nisi prius* (*Burr v. Harper*); but the correctness of that decision was denied by Patteson, J., in *Doe d. Mudd v. Suckermore*; and the propriety of the practice may fairly be questioned."(e)

The general standard by which the witness recognises the handwriting put before him must, it appears to the writer, be simply the general or universal idea which has already been fully

(a) Best on Evidence, § 240.

(b) 10 Cl. & F. 193.

(c) *Ibid.*, § 241.

(a) *Ibid.*, §§ 233, 238.

(c) *Ibid.*, § 237.

discussed in the chapter on the theory of the normal man. It is in virtue of the common elements existing between the particular writing and the general idea of the handwriting in the witness's mind that the comparison is able to be made. "In comparison," says Prof. Stout, "we first become conscious of the antithesis between the particular and the universal. The reason is that in it we become aware of the universal, as the common element which connects two clearly distinguished particulars. Thus the common element stands out in contrast to the differences; whereas in mere recognition no such contrast exists."(a)

We say the 'general idea' and do not lay stress on the 'generic image' because M. Binet has recently doubted the existence of the latter, his view as to thought being expressed as follows:—"Thought is an unconscious act of the mind which has need of words and images to become fully conscious. But however hard it is to represent to ourselves a thought without the help of words and images, and it is for this reason only that I call it unconscious—it exists none the less, it constitutes, if we would define it by its function, a directive, organising force."(b) It would, if this be so, be more correct apparently to say that it is in virtue of the general trend or channel of our ideas which is organised by thought on the occasion of each particular experience arising, that we recognise the particular handwriting shown us. It is the neural matter of the brain that is so affected by previous impressions made by the sight of such handwriting in the past that it responds at once to a similar impression now made by the sight of similar handwriting. But whether we speak of the influence of the trend of ideas or of awakening the generic image, it must be evident that the more examples of the handwriting which have been seen in the past the deeper the impression which will have been made, and we cannot understand the ground of the objection to allowing the

(a) Stout, *Analytical Psychology*, Vol. II, pp. 174, 175.

(b) A. Binet, *L'Etude Experimentale de l'Intelligence*, p. 108.

witness to refresh his memory by reference to a writing admitted to be that of the person.

Perhaps it would more nearly express the nature of this general standard if we employ the term 'general impression.' Concerning these Prof. James says that they seem to be the impulsive result of summation of stimuli: they come about through the subject dispersing his attention impartially over the whole, surrendering himself to the general look. He thus gets a total effect in its entirety, which is lost upon the man who is bent on concentration, analysis and emphasis. If the time is too short for the latter it is best to abstain from analysis and be guided by the general look. The person who has the general impression does not give any reason for it, but he *feels* it is so. He is guided by a sum of impressions not one of which is emphatic or distinguished from the rest, not one of which is essential, not one of which is conceived, but all of which together drive him to a conclusion to which nothing but *that* sum total leads. The man however by seeking to make some one impression characteristic and essential, prevents the rest from having their effect.(a)

This remarkable passage is capable of many applications in law and is alluded to elsewhere in this work: it is here cited to assist in showing what the nature of the standard is and to make it plain that it is idle to cross-examine a witness on the nature or composition of his general impression of a man's handwriting. From it we can also understand why the witness is able to give an opinion as to resemblance, for it was found that it was essential for the perception of resemblance, that there should be sameness in the two things but that the points of the sameness should be partly undistinguished and unspecified (para. 4): and this appears to be exactly the basis of this species of identification. This kind of evidence, whatever doubts there may be about its admissibility in English law,(b) is explicitly provided for by s. 47 of the Indian Evidence Act.

(a) James, *op. cit.*, Vol. II, pp. 350, 351, note.

(b) See Best, § 246.

7. In the other method, which is prescribed in ss. 45 & 73

By comparison of
two writings.

of the same Act, two or more writings are compared, and sometimes the opinion of an expert in handwriting is taken on them. What

is important here is distinctness of the ground of comparison or common factor: "In comparing two complex presentations," says Prof. Sully, "there is a further difficulty due to the need of a preliminary analysis, the discrimination and selection of the ground of comparison. It is found that the difficulty in this case varies inversely with the prominence of the element. By prominence is here meant its impressiveness relatively to that of the other elements. Thus it is difficult to compare two writings, two musical styles and so on, in respect of some subtle feature that is apt to be overpowered by more palpable and striking traits." (a)

A difference in opinion of two persons concerning the identity of the handwriting on two papers may often be accounted for by the fact that one has a special aptitude for noticing likenesses and the other for noting differences, and the practised aptitude of each will further the detection of that relation. (b) It is said, however, that more weight should be given to evidence of similitude than to that of dissimilitude, because it requires great skill to imitate handwriting especially for several lines, while dissimilitude may be occasioned by a variety of circumstances, such as the health and spirits of the writer, the care used, the pen, ink, etc. (c) But there is another reason given which requires examination.

Writing as reflex
action.

"Handwriting, notwithstanding it may be artificial, is always in some degree the reflex of the nervous organisation of the writer. Hence there is in each person's handwriting some distinctive characteristic, which as being the reflex of his nervous organisation, is necessarily independent of his own will, and

(a) Sully, *Outlines of Psychology*,
p. 248.

(b) *Ibid.*, p. 250.

(c) *Lawson's Expert Ev.*, 278

unconsciously forces the writer to stamp the writing as his own. Those skilful in such matters affirm that it is impossible for a person to successfully disguise in a writing of any length this characteristic of his penmanship; that the tendency to angles or curves developed in the analysis of this characteristic may be mechanically measured by placing a fine specimen within a coarser specimen and the strokes will be parallel if written by the same person, the nerves influencing the direction which he will give to the pen.”(a)

Whatever writing may be in the adult it certainly was not reflex-action in the child, but much that originally required conscious effort with practice becomes automatic and mechanical and, with this qualification, we do not object to the description. Ribot, however, distinguishes writing from reflex-movements proper, and the following quotation will show to what extent:—
 “Reflex-movements, whether reflex-action proper, natural and innate, or reflex-actions that are acquired, secondary and fixed by repetition and habit, are produced without volition, hesitation or effort, and may continue a long time without fatigue. They call into action, in the organism only those elements necessary to their effectuation, while their adaptation to ends is perfect. In the strictly motor order of things, they are the equivalent of spontaneous attention, which similarly is an intellectual reflex-action that presupposes neither choice nor hesitation, nor effort, and may likewise continue a long time without fatigue. But there are other classes of movements that are more complex and artificial; as for instance, writing, dancing, fencing, all bodily exercises and all mechanical handicrafts. In these instances adaptation is no longer natural but laboriously acquired. It demands the exercise of choice, repeated endeavour, effort, and at the outset is accompanied by great fatigue.”(b)

It seems necessary to try and determine to what extent writing is reflex and to what extent it can be modified by will, for it

(a) Rogers on Expert Testimony,
 291, 292, quoted on p. 389 of Ameer

Ali & Woodroffe's work.

(b) Ribot on Attention, p. 57.

is apparent that, if the claim of the experts in caligraphy is really correct, considerably more importance should be attached to evidence of handwriting than is usually done. It is a test of automatic actions that they do not involve attention, but are fixed and uniform responses to the fixed and uniform recurrence of similar modes of stimulation.(a) Now it appears to us that it would be untrue to say that writing does not involve attention; though the attention given is not a close one, it is to a certain extent controlled by vision and we soon become aware of this if we try to write in the dark. Practice dispenses with that close attention to the detailed elements of the composite train which was necessary at first and so the sensory elements become indistinct as compared with the motor ones, and the final result of the repetition is a habitual or quasi-automatic action in which all the psychical elements, presentations and representations alike become indistinct.(b) We do not believe however that the movements become so independent of the will that in forging or deliberately disguising the handwriting, where attention is pre-eminently displayed, the attention would not be likely to counter-act the effects of habit. It was found in the course of hypnotic experiments that "certain acts which are not purely mechanical cannot be suggested merely by the presence of the instrument which effects them. The act of writing, for instance, not only involves the exercise of the hand which traces the characters, but of the thought which co-ordinates the words in a given sentence." But when words and sentences were dictated to the patient holding the pen he could be induced to write, though the writing was often irregular: if care was taken about the position of the hand, an autograph can be obtained like those which are written in the waking state.(c)

It may perhaps be remarked that the conclusions drawn by writers on evidence are not in accordance with the opinions of the experts. Best says:—"Whatever may be the relative values of the several modes of proving handwriting which have been

(a) Stout, *op. cit.*, Vol. I, pp. 199, 200.

(b) Sully, *op. cit.*, pp. 188-89.

(c) Binet & Féré, *Animal Magnetism*, p. 282.

discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous ;” and again “standing alone any of the modes of proof of handwriting by resemblance are worth little ; in a criminal case nothing,—their real value being as adminicula of testimony.”(a) Ameer Ali and Woodroffe, after stating that a person may feign or alter the ordinary character of his handwriting with the very view of defeating a comparison, proceed to assert that “many men are capable of writing in several different hands ; and consequently where the object they have in view is to relieve themselves from liability, nothing can be easier than to produce to the Court genuine documents which have been written for the express purpose of proving that no similitude exists between them and the writing in dispute. A comparison of writings, therefore, for these and other reasons is a mode of ascertaining the truth which ought to be used with very great caution, especially if no skilled witness has been called to make the comparison.”(b)

This of course is attributing to mankind just the power which the experts on the subject say they have not got, and such assertions are probably too sweeping : in any case where there is no reason to suppose that one of the writings has been intentionally disguised, evidence as to resemblance of the handwriting is often too striking to be treated in this manner, and opinions such as those quoted seem to be based on the undue prominence which has been accorded to a few cases of mistaken identity of this description.

(a) Best on Evidence, § 247.

(b) Ameer Ali & Woodroffe, *op. cit.*, p. 520.

CHAPTER XIV.

AMEER ALI AND WOODROFFE'S EDITION OF THE INDIAN EVIDENCE ACT PSYCHOLOGICALLY EXAMINED.

It is now desired to examine from a psychological point of view some modern work on Evidence, and the latest Edition (*a*) of the Indian Evidence Act by Ameer Ali and Woodroffe has been selected, not from any special desire to criticise those authors, but because perhaps it is the most elaborate and prominent work on the subject before the public in India. The treatise consists largely of quotations, and it may be that opinions and remarks which are in reality merely reproduced from other writers will be erroneously attributed to the commentators themselves; by way of caution therefore we must explain our attitude on this point. It is considered that when authorities are quoted without criticism or dissent by the Editors they may be taken to have adopted and endorsed those views: this is the natural conclusion to be drawn in such a case, for we conceive that no commentator would cite the opinions of others by way of disapproval unless he in some way indicated that this was his intention.

The importance of psychology in the matter of evidence is admitted by these Authors in the General Introduction, when they refer the reader to a number of works on psychology. Their list of psychological writers, so far as they can be distinguished from those on logic and rhetoric, we understand to be Reid, Stewart, Butler, Hume, Locke and possibly Abercrombie with whose writings we must confess that we are not acquainted. Far

General Introduction,
p. cxiv, note
3

(*a*) At the time this was written the Third Edition of this work was not yet published. So far as the

author has perused that edition he has seen no reason to alter anything in this Chapter.

be it from us to seek to disparage great thinkers like Locke and Hume, but it may not be unfairly said that in their day psychology as a separate branch of philosophy did not exist, and we think that we are entitled to expect in a leading work on Evidence, published in the year 1902, if it professes to notice psychology at all, some recognition of the work of more recent psychologists. It is no exaggeration to say that not a single modern English or Foreign psychologist is named in the list given by these commentators, nor, to judge from the contents of the volume, have they consulted any such author, and we notice this fact, not so much to find fault with the work as to illustrate the truth of what is asserted in the introduction, that most legal writers are so fast bound by the traditions of the past that they will not even acquaint themselves with sources of knowledge which have not been consulted by their predecessors.

It is here said that satisfactory or sufficient evidence is
 p. cxv. that amount of proof which ordinarily
 satisfies an unprejudiced mind beyond
 reasonable doubt, and this degree of proof can never be previously defined. The legal test, however, is the sufficiency of the circumstances to satisfy the mind of an ordinary man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests.

Here, as elsewhere when we have discussed a matter in the body of our text, we shall merely refer to the results of such discussion. We have then to remark on this, that the test of reasonable doubt has nothing whatever to do with whether matters are of high or little concern and importance: it is a psychological test, as we have explained in the Chapter on Belief and Doubt (*a viz.*, a doubt is reasonable or not according to the extent to which you can think the opposite or alternative of the proposition affirmed. Further, as regards the mind of an

(a) See Chap. VIII, pp. 227-9.

“ordinary man,” we have contended in the Chapter on the Theory of the Normal Man^(a) that such a person has no existence, mental or otherwise, and that as a standard of conduct is incapable of application to particular circumstances. The judge or the jurymen as a matter of fact in each case substitutes himself as the standard to judge by in place of the supposed average man.

“Upon general principles affirmative is better than negative evidence. A person deposing to a fact
pp. cxvi-cxvii. which he states he saw, must either speak truly, or must have invented his story, or it must be a sheer delusion. Not so with respect to negative evidence; a fact may have taken place in the very sight of a person who may not have observed it: and if he did observe, may have forgotten it,” and just previously it is said that if two men were present and one says a fact occurred and the other denies its occurrence, greater weight should be attached to the witness alleging the affirmative.

These remarks appear to be of doubtful validity; the witness alleging the affirmative does not necessarily either speak truly or else invent his story, he may do both. He may exaggerate the facts or may purposely omit to mention some and so create a wrong impression; this is a frequent source of error. The arguments from sight and memory are also open to dispute: a man may misinterpret what he sees as much as he may fail to observe, and he may confuse in memory events which have happened at different times just as easily as he may entirely forget. This is amply illustrated in the Chapters on Illusions and Memory.^(b) It appears also that the nature of a negative is not sufficiently understood: it is explained elsewhere^(c) that we assert a negative on the basis of a positive idea, and when we say that we do not remember that a fact occurred, it is because we recollect a state of things which was inconsistent with the fact whose

(a) Chap. VI.

(b) Chap. XII, pp. 341-2. Chap. IV,

p. 128, *et seq.*

(c) P. 392.

occurrence we deny. Unless we recollect this, we usually do not make a definite statement at all, at all events when we are in a Court of Law. It depends therefore on the manner in which the negative evidence is given.

The preference of one kind of evidence to another does not really depend on affirmation and negation, but on the interest of the observer, of which examples are given in this volume *passim*. This may however have two results, some will accept a fact because it appears to their interest, while others will on that very account suspect it.

“ More weight should be given to men’s acts than to their words.” As the authority for this statement is quoted an extract from 1 Moore l. A., 42, 43, *Meer Usdoollah v. Mussumat Beeby Imaman*, which runs as follows :—“ Much greater credence is to be given to their acts than to their alleged words, which are so easily mistaken or misrepresented.” The Commentators do not appear to see that the quotation does not really support the dictum of the text, for the quotation simply means that you can trust *the report* of men’s acts rather than *the report* of their words : what the text asserts is that assuming both are correctly reported, more weight should be given to their acts.

It is probably true that men’s acts are the more trustworthy because the fact that an action took place shows that a deeper impression was made on the man, and in consequence so much energy was released as to overcome inertia, the natural obstacle to action. Thus it would be in favour of the credibility of a witness who states that he saw a murder, that he went to the police-station and made a report rather than that he merely told a friend. At the same time this is not universally true : men have been known to see a person drowning and casually mention it two or three days afterwards. Such an attitude is to a certain extent characteristic of Burmans who will see a crime and not mention it, either from lethargy or because they are afraid that it will in some way involve them in trouble or give them trouble

e.g., through having to go a long distance to Court to give evidence. Such motives cannot be left out of account.

As an index of what he thinks a man's acts are often more valuable, for they represent his whole self more, all his past as well as his present, his sub-consciousness as well as his consciousness, for they are usually the result of some consideration, while words often are not.

We understand the meaning of the text and note here to be
 p. cxx, note 1. that the English system of judicial evidence
 is of modern date because it has grown up
 with our social progress. We quote this because, if the law
 of evidence is avowedly to meet our social needs, psychology
 which explains so much by the social factor (*a*) should clearly
 be used in its application, and especially will it be valuable where
 the question of difference of race arises in deciding how far
 what is suitable for the English is suitable for the East.

The Commentators distinguish between formal and real
Ibid: and note 2. truth, and say that juridical proof mainly
 depends on formal truth. They then
 remark that the Legislature, judges and text-writers have
 done much recently 'by the aid of a free logic' to place the law
 of evidence 'on broad and scientific, and therefore practical
 foundations,' the object and effect being to make formal truth
 coincide 'so far as such coincidence is just and practical,' with
 real truth: and they add that this result has been in a great
 measure attained by the Indian Evidence Act. In the note
 Best on Evidence is cited to the effect that 'it is the tendency of
 modern jurisprudence to admit most evidence logically relevant.'

We like this naive confession that the law sets formal
 truth above real truth, though at the same time it might well be
 explained what 'formal truth' is. It seems somewhat of a
 paradox to describe anything as truth which differs from real
 truth, but it conveys the notion that, whatever else it is, it must

(*a*) Stout, Manual of Psychology, of Psychology, Chap. XIV.
 pp. 532-542 and 573: Groundwork

be something artificial, and therefore our lawyers appear to claim the power of making truth. We conceive two possible senses in which the phrase may be used : according to the first meaning, it may be employed as in the expression ' formal logic ' to indicate that that is true which follows as the conclusion from the premisses according to a fixed method of reasoning, no regard being paid to the truth of the matter of the premisses. If used in this sense presumably the laws of evidence are held to correspond to the rules of formal logic, and we think that our contention raised in the introductory chapter that the law aims not at truth but logic is thus in substance admitted. (a)

In the second sense it may be used to signify that to be true a thing must fit into a formula, must be brought under some legal precedent or the like before it can be accepted. The sense is suggested to us by the feverish desire shown by the legal profession on every occasion to produce a precedent and show that the matter in dispute comes under some ruling, an attitude which has been sufficiently criticised in the introduction. (b)

There may be other meanings, but if so, they have not occurred to us. If truth is aimed at in either of the two senses we have suggested, it does not appear to require argument to show that neither will the law of evidence suffice to meet the requirements of daily life nor will much justice result from their application, and the passages quoted sufficiently demonstrate that the lawyers have no confidence in their own method.

For what else is the meaning of the statement that they are striving to make formal truth coincide with real truth ? You cannot alter real truth, so it must mean that they are gradually giving up formal truth, wherever it differs from the real, and this is the true signification of the talk about ' the aid of a free logic,' etc., and the quotation from Best ' that the tendency is to admit what is 'logically relevant.' With this may be compared the adjuration (quoted on p. cxxvi) to apply the principles laid

(a) Chap. I, p. 7.

(b) Chap. I, pp. 2, 8, &c.

down on competent authority 'broadly' and the following passage (see p. cxxxiv) which, though it has been quoted in the introduction, will bear a citation here :—"It has been said in England, where the traditional theories still possess much strength, that artificial rules upon matters of evidence are better avoided as much as possible, and that the law now is that, with a few exceptions on the ground of public policy, all which can throw light on the disputed transaction is admissible."

"The reasons which judges who concurred in a particular decision may have assigned for their opinions
 p. cxxvi. have not the same degree of authority with the decisions themselves."

This remark occurs in connection with the use of decided cases as precedents, and as such seems to us both satirical and inconsequent. It is not disputed that a right decision is often made though wrong reasons for it are given, but this does not give the decision any authority *as a precedent*. Such authority is derived from the reasons rather than from the conclusion itself, as must be apparent if it is considered how under such circumstances a right decision is arrived at. For it is made as the result of qualities entirely personal to the judge, which are utilized under particular circumstances external to him that can never recur. It means that observation of ordinary facts of every day life are a better guide than legal rules : the judge has used his past experience of men and things conscious and sub-conscious, but has failed to make it explicit in words. He has not really used the reasons he gives at all : the difficulty about giving reasons lies in the fact that he is trusting to his general impression of the case which cannot be analysed.

This frame of mind is described by Professor James as the impulsive result of summation of stimuli and not reasoning. It comes through dispersing the attention impartially over the whole, surrendering one's self to the general outlook : one thus gets a total effect in its entirety which is lost upon the man who is bent upon concentration, analysis and emphasis. The person


who has the general impression does not give any reason for it, but feels it : he is guided by a sum of impressions not one of which is emphatic or distinguished from the rest, not one of which is essential, not one of which is *conceived*, but all of which drive him to a conclusion to which nothing but that sum total leads. The man who seeks to make some one impression characteristic and essential prevents the rest from having their effect. (a)

It would be well if advocates and Appellate Courts could understand this and recognise the futility of considering merely the reasons given in a judgment as exhausting the value of the decision. This has been recognised in the case of verdicts of juries in the following words :—“ The general impression left by a trial is like the general impression left by a book or conversation. Great part of it is forgotten even before the conclusion is reached, but the effect remains, though the cause passes out of sight. The hearer of a complicated mass of evidence will come to a conclusion in his own mind as to whether or not it has produced the result at which it was directed, just as a reader of a long argument may, at the end, be satisfied that the author has proved his point, though he could not repeat the steps of the proof. Jurymen form their opinion by degrees, as the case goes on. They feel that this or that point is established, that this or that witness is discredited or is deserving of confidence, nor is the value of these conclusions much diminished by the fact that those who form them are often unconscious of the particular steps by which they are reached. It is in this way that many of the most important opinions and resolutions in life are formed. Who can specify all the reasons why he likes this man or that, or embarks upon this or that undertaking ? ” (b)

(a) W. James, *Principles of Psychology*, Vol. II, pp. 350-1, note. The reader must regard the value of this quotation as the excuse for its frequent

repetition in this volume.

(b) Stephen, a general view of the Criminal law of England, p. 207.



The meaning of 'facts forming part of the same transaction' is discussed here. Our own views on this
pp. 58, 59.

subject have been given in the chapter on Identity and Similarity^(a) and here we desire to note the opinion in conformity with our own,—that the incidents may be separated from the acts by a lapse of time more or less appreciable. A transaction may last for weeks. But when it is said that they must stand in an 'immediate' causal relation to the act, we must refer the reader to our remarks concerning the necessity of a causal relation in the above quoted chapter, and, as regards the expression 'immediate' in relation to causality, we have explained its difficulties in the chapter on Causation.

We must leave the reader to discover, if he can, the meaning of the italicised words in the following: "Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible though hearsay, *because in such cases it is the act that creates the hearsay, not the hearsay the act.*"

It is epigrammatic, but appears to require explanation.

We cannot refrain from remarking on the inadequacy of this treatment of causation, and its uselessness has been pointed out in paragraph 6 of the Chapter on Causation.

"A motive is, strictly, what its etymology indicates, that which moves or influences the mind. An
p. 61.
p. 65.

action without a motive would be an effect without a cause, and as, to take for example criminal cases, the particulars or external situation and conduct will in general correctly denote the motive for criminal action, the absence of all evidence of an inducing cause, is reasonably regarded where the fact is doubtful, as affording a strong presumption of innocence."

(a) Chap. XII, paras. 1, 2, 3.

Why we consider this passage to be confused and to contain more falsehood than truth has been stated at length in Chapter III, para. 7.

“ There must exist a motive for every voluntary act.” It has been shown in the same paragraph that
 p. 67. without a clear understanding of what is meant by ‘ voluntary ’ this may easily be false, and it is almost certainly tautological.

“ Fear indicated by passive deportment, as by trembling, stammering, starting, &c., or by a desire
 p. 68. for secrecy, *e.g.*, as by disguising the person or choosing a spot supposed to be out of the view of others.”

In so far as this purports to describe the demeanour of a person under the emotion of fear, it has to be remembered that other emotions cause at least some of these symptoms, and that fear is itself accompanied by different outward manifestations on different occasions. It does not always render the person quiescent; he as often takes to flight, for in fear conative tendency is at once excited and obstructed and when the psychical activity is barred in certain directions it diverts itself into whatever channels it can find. When an animal is excited by fear it frequently rushes wildly into the danger it seeks to avoid.(a)

Laboured breathing, palpitation, trembling, &c., are expressions of actual bodily pain as well as of strong fear, and fear does not always arise from pain. According to Best, several of the symptoms which occur in fear are also indicative of disease as well as of surprise, grief, anger, &c.(b)

“ But what a person has been heard to say while talking in his sleep seems not to be legal evidence
 p. 151. against him, however valuable it may be as indicative evidence : for here the suspension of the faculty of judgment may fairly be presumed complete.”

(a) Stout, *Manual of Psychology*, pp. 312-318.

(b) Best on Evidence, § 466, see also p. 259, *supra*.

This passage will be found discussed in the Chapter on Insanity ;(a) psychologically speaking it is not apparent why statements made by a drunken man are not similarly treated.

“ The word ‘ discovery ’ may either mean the purely mental act of learning something which was not known before to a person, as the mere mental act of becoming aware of something after hearing it stated ; or the physical act of finding upon search or enquiry something, or material fact, the existence or the exact locality of which was unknown till then. It is in the latter sense that the word is used in this section (s. 27), that is, in the sense of a finding upon search or enquiry of articles connected with the crime or other material fact ; the reason being that it is only this kind of discovery which proves that the information, in consequence of which the discovery was made, is true and not fabricated.”

It seems to us that there is no such distinction between mental and physical discovery as that here supposed. In reality there is one process which always involves a mental act and is sometimes accompanied by a physical one and sometimes not. ‘ Discovery ’ has no technical meaning in psychology or science, but refers always to an external object. The other meaning tried to be assigned here is far too general to have any definite signification. In note 3 on this page it is said that in all cases under the section the discovery was of articles or other material facts, but we conceive that in a case, *e.g.*, of criminal breach of trust, if some statement of the accused led to the elucidation of some accounts in a sense pointing to his guilt, this would be a discovery within the meaning of this section. The criterion as to whether there has been a ‘ discovery ’ or not is, we should imagine, whether anything new, *i.e.*, previously unknown, has or has not come to light in consequence of the statement.

(a) Chapter XI, para. 9.

“In consequence of information” (marginal heading) and
 p. 220. the rulings cited here and on pp. 222, 224,

concerning the Causal connection are discussed
 in the chapter on Causation.(a) They involve the error that for
 causality you must have proximity in time and space, and so
 lead to the postulating of events as the cause which are not really
 the determining factor among the conditions. The misleading
 use of the words ‘proximate’ and ‘immediate’ is also shown
 in the same chapter.

“The experienced fact, that implicit reliance cannot in all
 p. 250. cases be placed on the declarations of a
 dying person; for his body may have survived
 the powers of his mind; or his recollection, if his senses are not
 impaired, may not be perfect.”

A less general statement is wanted for that in the text, if
 regarded as of universal application, is misleading. Pathology
 shows that it depends entirely on the kind of death; *e.g.*, in
 diphtheria the intellect is clear to the end and in some brain
 diseases some of the mental powers are affected and not others.
 There are also the so-called supernatural cases, to which allusion
 has been made in the chapter on the Senses,(b) in which the powers
 of the mind seem greater than normal just prior to death, and
 especially the case of drowning when men are said to recollect
 all their past lives in a moment or so.

“In the absence of all suspicion of sinister motives, a fair
 pp. 250-1. presumption arises that entries made in
 the ordinary routine of business are correct,
 since the process of invention implying trouble it is easier to
 state what is true than what is false.”

It is not always easier to state what is true, as it is sometimes
 a trouble to find out what the truth is, and a man may there-
 fore merely put down what he thinks. The real reason—the
 mention of which is entirely omitted here—is that ordinarily a

(a) Chapter VII, para 7.

(b) Chapter V, para 5.

man has not sufficient interest to falsify while he has an interest to keep up true accounts, and interest has in many ways a most important influence.

Speaking of 'matter of fact' and 'matter of opinion' it is said "an instance, erroneously supposed
 p. 378. to be simply an 'opinion,' is found in cases where the phenomena being too numerous or intangible to permit of correct or effective individual statement, witnesses are permitted to state simply the impression such phenomena produced in their minds. This, apparently, is simply another method of stating facts."

This passage is referred to in the Chapter on Inference(a) where it is pointed out that the commentators have fallen into confusion between sensuous inference and intellectual inference. The latter is mediate and conscious and not merely implicit, it is what is usually understood by the term 'inference' and is employed when we speak of opinion. We do not see how an 'impression' of the sort mentioned in the quotation can be referred to as a fact as opposed to an inference of any kind: the real explanation of their admission in evidence seems to be given lower down on the same page, viz., that positive and direct evidence is unattainable here. Hence they are also described as 'opinions from necessity.' If the impression be regarded as one fact, a witness of course may speak directly to the existence of the impression, and this would involve no inference; but if the impression is taken to represent the result of many sensations, observations, &c., then it seems to us it must clearly be regarded as the conclusion drawn from a number of data, though we are willing to admit that the conclusion is not drawn in as fully conscious a manner as a regular inference with an explicit middle term.

The process has already been described in the quotation from Professor James' work given earlier in this Chapter,(b) and it

(a) Chap. V, paras. 8 & 9.

(b) See p. 382.

must be insisted that the general impression or total effect is not the same thing as all the facts from which it is drawn shortly stated, which is what we understand the commentators to mean when they call it 'simply another method of stating facts,' and is further indicated by the next quotation from page 379. "We do not allege," says Prof. Stout, "that a whole may be apprehended as such—*i.e.*, as a synthesis or combination—without some discernment of the plurality which it includes; what we do say is that without discernment of the multiplicity it really comprehends, it may yet be apprehended as having a characteristic nature distinguishing it up to a certain point and for certain purposes from other things, and therefore as possessing the unity which such distinctness directly implies." (a) Of course we are not contending that such evidence should be excluded, but its admission should not be defended on a false ground. General impressions, *e.g.*, of conversations, &c., we have heard are valuable because our ability to reproduce the substance of what we have heard or read in language of our own differing from that in which it was originally conveyed shows that we have not listened mechanically but attended and used our minds at the time. (b)

"As all language embodies inference of some sort, it is not possible to wholly dissociate statement of
 p. 379. opinion from statement of fact. The evidentiary test has been said to be, that if the fact stated *necessarily* involves the component facts, it will be admissible as amounting to a mere abbreviation: if it does not necessarily involve them, but may be supported upon several distinct phases of fact, the particulars only should be given and not the inference."

It is not the language which necessitates the inference but the interpretation of the percepts, *i.e.*, the sensation and objects presented to our senses: language only embodies the results of the

(a) Stout, *Analytical Psychology*,
 Vol. I, p. 86.

(b) *Ibid*, p. 87.

inferences already made. It seems to us therefore a confusion to say that we cannot dissociate opinion from fact because each has to be stated, and the method of statement involves inference in each case : because the method of statement is identical it does not therefore follow that what is stated is also identical, which appears to be the argument employed. It is further, we must repeat, impossible to arrive at any satisfactory result if sensuous and intellectual inference are confused, as they are when it is said or implied that, so far as inference is concerned, we do the same when we observe a fact and when we draw a conclusion. In a purely psychological or metaphysical treatise such a statement might be made and profitably discussed, but not in a work on legal evidence.

“ The evidentiary test, &c., mere abbreviation.” These words seem to mean that when a man states his own impression of a number of facts it is equivalent merely to an abbreviated statement of all those facts, a view, to which we have just objected above : you cannot get the impression or general idea of anything without leaving out a number of the particulars which go to make it up and joining together others in virtue of what they have in common. The general idea is a reasoning in embryo ; to generalize an object is to affirm something in addition to the result of a single experience.(a) Further, we must again dispute the argument used here : it does not follow that because a fact (if the term can be used in this way as equivalent to a total) necessarily involves other component facts, that therefore it is in its totality nothing more than those facts simply enumerated.

“ A person may always testify to his own mental and physical condition, his testimony being based
 p. 380. not on inference but on consciousness ;
 but it is not so with respect to the mental condition of others.”

(a) Binet, *Psychology of Reasoning*, p. 175.

This has been discussed under the head of Introspection,(a) where it is said that this distinction drawn between inference and consciousness is hardly warranted, and the errors attaching to the introspective method are reviewed. A man's statements as to his own mental condition are preferable really, not so much because he uses a different mental process in arriving at them, as because the mental process has here become mechanical and therefore less subject to error.

“ Handwriting, notwithstanding it may be artificial, is always, in some degree, the reflex of the nervous organisation of the writer,” &c.
p. 389.

The importance of this passage is noted in the section concerning Comparison of Handwriting.(b) It is probably only correct to a certain extent, writing being in the first instance a fully conscious process. From their remarks elsewhere (see p. 520) it would appear that the commentators do not adopt the view maintained in the quotation, but rather seem to discount too much the value of evidence of handwriting.

Character evidence is dealt with in these pages, and we have treated the same subject under the head of Habit.(c) We have there objected to the definition of ‘ disposition ’ here given as too wide, and on the ground that it fails to take account of the influence of environment on men; it is also pointed out that evidence as to a person's *general* reputation cannot really be given. You must ask what his reputation or character is in respect of some particular quality. It is further maintained that stating what a man's general reputation for honesty, &c., is by repeating what is said about him in the neighbourhood is not legitimate evidence: it should be confined to evidence about his disposition based on personal knowledge of the man. Disposition is essentially general, and there is no need to coin the

(a) Chapter V, para. 7, *et seq.*

(c) Chapter IX, para. 10.

(b) Chapter XIII, para. 7.

phrase '*general disposition*' : a man's disposition is a compound of his past, the general tendency or predisposition to certain kinds of acts resulting from all his past acts, ideas, experience, &c. If the commentators have in mind any opposition between general and particular disposition, we do not know what it is : it would seem to be a confusion with the disposition to do particular acts.

" Words are but the expression of facts ; and therefore, when

p. 681.

nothing is said to be done, nothing can be said to be proved ; which is probably what

is meant by the expression '*per rerum naturam, factum negantis probatio nulla est*' " to which is attached the following note,

" Best on Presumptions, 39, 40 ; and so in Co. Litt, it is laid down broadly : ' It is a maxim in law that witnesses cannot testify a negative, but an affirmative.' From these and similar expressions it has been rashly inferred that ' a negative is incapable of proof '—a position wholly indefensible, if understood in an unqualified sense. "

The opening words, which are a quotation, (a) if they really do represent the true meaning of the saying that ' a negative cannot be proved ' reduce it to a colourless truism. Best construes the words '*per rerum naturam, factum negantis probatio nulla est*' as meaning simply that in the ordinary course of things the burden of proof is not to be cast on the party who merely denies an assertion. (b) Whatever may be the correct interpretation of the Latin maxim, it appears to us that there is no objection to the assertion that a negative cannot be proved, if it is taken to mean ' directly ' proved as opposed to indirectly. It is only possible, so far as we know, to prove a negative by establishing something positive which is inconsistent with the fact you wish to negative, and this follows necessarily from the nature of negation itself. There is no such a thing as a bare negative idea : every negative has a positive basis, it excludes in virtue

(a) See Gilbert, Ev., 145, 4th Edition.

(b) Best on Evidence, § 270.

of something positive which is incompatible with what is excluded.(a) This explains why an alibi is such a popular defence: it is the most obvious way of proving something inconsistent with the fact alleged, and so establishes the denial or negative of it.

Exception may also be taken to the assertion that "words are but the expression of facts." Language has two functions: it is a means of communications and it is also an instrument of thought, and these functions are inseparably connected and inter-dependent.(b) Words besides calling up mental images and expressing mental states, often stand for universal and not particular ideas and are sometimes mere emotional expressions.

"States of persons, mind or things, at a given time, may in some cases be proved by showing their previous existence in the same state; there being a probability (weakened with remoteness of time) that certain conditions and relationships continue, *e.g.*, human life, marriage, sanity, opinions, title, partnership, official character, domicile."

"The character and habits of a person is presumed to continue as proved to be at a time past."

The validity of the presumption of the continuance of a person's character and opinions is discussed under the heading Habit.(c) It is pointed out that the mental law is change rather than fixity or permanence, and that the application of the presumption here is a mistake. It is more likely to be correct as to character than opinions because of the effect of habit, but here it is really based not on continuance but on repetition. As regards the ordinary legal presumption that 'things remain in their original state' (p. 779), there is no more ground for presuming this rather than the contrary(d); and with reference to the form in which the present commentators state it, *viz.*, when the

(a) See also p. 378, *supra*.

(b) Stout, *op. cit.*, Vol. II, p. 192.

(c) Chapter IX, para. 9.

(d) Chapter X, para. 6.

existence of a personal relation or state of things *continuous in its nature* is once established by proof the law presumes that such status continues to exist as before," &c., we have pointed out that there is no presumption or inference in the case.(a) To lay down that a thing continuous in its nature continues, may be safe but it certainly incurs the charge of puerility.

"Sanity or insanity once proved to exist is presumed to continue. But aliter as to temporary insanity produced by drunkenness, violent disease or otherwise." and again, "there arises, in the case at any rate of insanity of a permanent type, a presumption that insanity continues."

The question of the justification for presuming the continuance of insanity is raised in the chapter on that subject,(b) and it is concluded that no general presumption can be drawn as it depends entirely on the type of insanity. From certain symptoms it may be inferred that the disease is an incipient state of a madness which never disappears, but in other forms it is periodic or recovery is practically certain, in the absence of some other cause supervening.

By the insertion of the words 'temporary' and 'permanent' our commentators seem to again merely beg the question, as is pointed out in the same passage.

"It may also be presumed that animals as a general rule act in conformity with their nature; as that untended cattle will probably stray, that horses will take fright at extraordinary noises and sights and the like. Similar presumptions may be made as to the conduct of men in masses, such as that persons in fright will act instinctively and convulsively."

These are classed under the heading "Physical presumptions" but the expression 'nature' is perhaps a wrong term or at least signifies nothing sufficiently definite. The words 'nature'

(a) Chapter IX, para. 9.

(b) Chapter XI. para. 8.

‘untended’ ‘extraordinary’ in the context in which they are here employed are little short of a *petitio principii*, or certainly cause the propositions to appear tautologous. The conduct of men in masses is to be explained really by the instinct of imitation, when men get together in a crowd the higher centres are suppressed, i.e., the critical judgment, for which imitation is substituted. They rely on one another and do not exercise individual judgment: they revert more or less to the gregarious animal, and what comes out is emotion rather than reason, and hence they act instinctively and convulsively as *e.g.*, in the case of a theatre fright. It is not, however, only in cases of fright, but also when other emotions such as joy and anger sway them, as is illustrated by such conduct as that of the members of the London Stock Exchange on the occasion of the relief of Mafeking, or of an American crowd lynching negroes: fright, joy, &c., merely intensify the emotion. When such actions are attributed to ‘nature’ it must be remarked that it seems an insufficient explanation to refer it to the qualities, instincts, &c. (if that is what is meant by ‘nature’) of the individual; mental sympathy between man and man doubtless is responsible for something, though this phenomenon has not as yet been sufficiently studied to say exactly what this is. People in society do act more on impulse and solitary individuals more on judgment.

“A sane man it has been said is conclusively presumed
 p. 804. to contemplate—the natural and probable
 consequences of his own acts. It must, however, be remembered that probable consequences may result from acts as to which the law by pronouncing them to be negligent expressly negatives intent; and it would be repugnant to justice that one should be conclusively presumed to intend the consequences of his accidental or unavoidable acts.”

In the chapter on Intention(*a*) the objections to the theory that a man must be presumed to know the natural and

probable consequences of his act and therefore to intend them, have been stated at length : and as regards the determination of what are 'natural and probable consequences,' the difficulties of this will be found discussed in the chapters on Causation(*a*) and the theory of the Normal Man.(*b*) It would occupy too much space to repeat them here, and it will suffice to say that there are psychological reasons given against this doctrine of intention which are worthy of study.

That part of the passage quoted which refers to negligence has been also specially considered in the section on Intention in estoppel(*c*), and it is there pointed out that it is not in agreement with other statements of the commentators in which they arrive at the conclusion that negligence and intention are the same for the purposes of estoppel (pp. 857-8).

“Where a woman of twenty years of age was found to have administered *datura* to three members of her family, it was held that she must be presumed to have known that the administration of *datura* was likely to cause death, though she might not have administered it with that intention.”

This decision in *Q.-E. v. Tulsa* is quoted without any expression of disapproval, yet, if correct, it clearly shows that intention and knowledge are not always the same, and that in this case, by presuming that they are so, you presume deliberately against what you admit is probable, which is somewhat extraordinary logic.

In note 7 to this page the doctrine is quoted in the form ‘a person is presumed to intend the natural and legal consequences of his act,’ and we have given elsewhere(*d*) an example of what may follow from the presumption as to ‘legal’ consequences.

“So also is it immaterial to know what the *motive* or the *state of knowledge* is of the party making the representation. The main determining element in every case is not the motive or the state of knowledge of

(*a*) Chapter VII, para. 9.

(*b*) Chapter VI, para. 2, *et seq.*

(*c*) Chapter III, para. 5.

(*d*) Chapter III, para. 4.

the party estopped, but the effect of his representation or conduct as having induced another to act on the faith of such representation or conduct.”

The subject of intention in estoppel is here under discussion. You may judge an act by the intention or by the effects, or you may take both into consideration, but what you cannot do, at least if you have any regard for truth, is to say that the effects are the intention, which is the principle here adopted. Concerning this passage and the meaning of intention in estoppel, the reader is referred to the remarks in the chapter on Intention.(a) It is there demonstrated that by means of precedents and the opinions of legal text-writers the doctrine of estoppel has been so perverted that the word ‘intentionally’ in section 115 of the Indian Evidence Act may just as well be excised from the section for any rational meaning that it is allowed to have.

In another section(b) we have protested against judging action purely by results and have shown the logical consequences of such a method and its artificial character as employed in law.

“Assuming that there has been a representation in the sense mentioned, and that that representation is
pp. 841-842. clear and unambiguous, and the other party has been induced to act thereby, it is immaterial what the intention, motive or state of knowledge of the party making the representation was,” and there then follow four propositions quoted from the case of *Carr v. London and North-Western Railway Company*.

This again strikes us as directly opposed to section 115 of the Act, and we have criticised it and also the third and fourth propositions in this sense in the section previously quoted.(c) These propositions also introduce, the one the impracticable standard of the normal man, and the other, the various difficulties which surround the theory of ‘proximate cause.’

(a) Chapter III. para. 5.

(c) Chapter III, para. 5.

(b) Chapter II, para. 6.

This note attempts to explain the meaning of 'real' and 'proximate' cause. In the chapter on Causation(a) the difficulties of these terms will be found discussed at length.

p. 843,
note 1.

"And when in answer to an inquiry a person gives an evasive misleading answer it will estop *even though it may not have been intended to de-*

p. 844.

ceive, if its effect was in fact to deceive the enquirer."

So the commentators dutifully record the decision in *McConnell v. Mayer*, 2 N.-W. P. H. C. R., 315 (1870). Compare this with s. 115 of the Evidence Act, "When one person has by his declaration, act or omission, *intentionally* caused or permitted another person to believe a thing to be true and to act upon such belief, &c." If charged with directly contradicting what the law enjoins, we suppose that the commentators would say that a person may intentionally cause another to believe a thing to be true which in fact is not true, without intending to deceive him: this no doubt might be so, but we do not understand how a person could give an 'evasive misleading answer' without intending to deceive the enquirer. Possibly he could give a misleading one without such intention, but the word 'evasive' in its ordinary acceptance implies, we think, something which is not straightforward and therefore which is intended to deceive. For what is the alternative? If it is not intended to deceive, it must be either intended to give the true answer or to give no answer at all to the question asked: if the former, on what grounds can it be termed 'evasive'? while if the latter, how can a person be said to 'intentionally cause another to believe' anything when his intention is to give no answer at all to the question? If again, it is said, that the answer by not contradicting the questioner 'permits' him to remain in a wrong belief, then if this is 'intentionally' done, as it must be according to the act in order to create an estoppel—there must be some intention to deceive.

The fact is that the only *raison d'être* of an evasive answer is the desire to give either no reply or a false one, *i.e.*, either itself false or one that will have the same effect as a false answer.

The term "wilfully" is here said to mean "intentionally" or "voluntarily," and it is said that intention
 p. 857. may be "presumable" as well as "actual,"
 p. 858 in the sense that it is what a reasonable man would take it to be whatever may have been the party's real intention.

In one chapter on Intention(*a*) the meaning of 'wilfully' as used in law has been discussed. The criterion for judging intention here introduced is the expectation of a reasonable man, and again (p. 859) what would govern the conduct of a prudent man : all such standards, in addition to neglecting the actual intention of the doer or speaker, are liable to all the objections enumerated in the chapter on the theory of the Normal Man.

"Thus neither want of religion, nor physical defect, &c.
 form any ground for the exclusion of
 p. 882. testimony." "The Court has not to enter
 p. 884. into enquiries as to the witness' religious belief, or as to his knowledge of the consequences of falsehood in this world or the next."

It seems to be generally admitted that an oath to have any value requires that the witness should have a belief in some Avenging Power or in a future state of rewards and punishments.(*b*) The fact therefore that no attention is any longer paid to the religious beliefs or the want of religious beliefs of the witness, as well as various provisions of the Indian Oaths Act, seem to show that it is not any longer considered that an oath is a guarantee that a witness will speak the truth.

The utility of oaths is a disputed question,(*c*) some even holding that they tend to cause perjury,(*d*) and we mention this as

(*a*) Chapter III, para. 6

(*c*) *Ibid.*, § 59.

(*b*) Best on Evidence, §§ 57, 134,
161.

(*d*) T. H. Buckle, History of Civilisation, Chap. V. where he also quotes

it is frequently urged that a confession is less trustworthy than ordinary evidence because it is not made on oath : in the opinion of some this apparently should not detract from it but would rather be in its favour.

“ An idiot is one who is born irrational; a lunatic is one who born rational has subsequently become irrational. The idiot can never become rational.”
p. 885.

This last statement is perhaps too strong; see the remarks in the Chapter on Insanity concerning idiots.(a)

“ This applies to the case of a monomaniac or person affected with partial insanity, who may be a very good witness as to all other points than that on which he is insane.”

In the same chapter it is explained why this is so.(b)

“ Ordinarily a witness cannot be asked as to a conclusion of law. Sometimes this has been so far pressed as to involve the assumption that a witness cannot be asked as to conclusions of fact. The error of such a contention consists in this, that there are few statements of fact which are not conclusions of fact. The conclusions of a witness as to the motives of other persons is inadmissible, motives being eminently inferences from conduct. Yet when a party is examined as to his own conduct, he may be asked as to his own intention or motive, his testimony to such intention or motive being based not on inference but on consciousness.”
pp. 947-48

As regards this view concerning conclusions of fact, the reader is referred to our previous remarks on the confusion of sensuous with intellectual inference(c) and with reference to the distinction between inference and consciousness to what has already been said on the subject.(d)

Archbishop Whately, Elements of Rhetoric. Edition 1850, p. 47. to the same effect: F. Paulsen, A system of Ethics, Edition 1899, translated by F. Thilly. p. 671.

(a) Chapter XI, para. 7.

(b) Para. 5, *Ibid.*

(c) pp. 388, *et. seq.*

(d) P. 391.

“A witness may give the substance of conversations or writings, but he will not be permitted to say what is the impression left on him by a conversation unless he swears to such impressions as recollections and not inferences. And it is enough if a witness swears to events and objects according to the best of his recollection and belief.” We have already^(a) stated to what extent these ‘impressions’ are inferences, and it has been shown in the chapter on Memory that you cannot distinguish recollection from inference in the way here supposed.^(b) Memory in fact itself implies inference, as does often Belief. It seems to us a mistake to attempt to justify the statement by witnesses of their impressions by distinctions and reasons which are really not true, as, *e.g.*, in the following passage (p. 968): “Further, in order to save time, a witness will be permitted to state the *result* of numerous or voluminous documents, subject to cross-examination as to particulars,” or again (p. 501) “so a witness who has inspected the accounts of the parties, though he may not give evidence of their particular contents, will be allowed to speak to the general balance without producing the accounts: and where the question is as to the solvency of a party at a particular time, the general result of an examination of his books and securities may be stated in like manner. But the word ‘result’ must be construed strictly to mean the actual figures or facts arrived at.”

Surely it is idle to try and hide in this manner the fact that the “result” is an inference and that an inference is here deliberately permitted.

“The force of any corroboration by means of previous consistent statements depends upon the truth of the proposition that he who is consistent deserves to be believed. The corroborative value, however, of such previous statements is of a very varying character dependent upon the circumstances of each case, and a person may equally persistently adhere to falsehood once uttered, if there be a motive for it.”

(a) Pp. 388, *et seq.*

(b) Chapter IV, para. 7.

A person may no doubt adhere to a falsehood, but it is not equally easy to repeat a true story and a made-up one, and the longer and more detailed it is the harder it becomes. This follows from the nature of memory itself : events that have really happened will always be recalled in the same chronological order because that is the order in which we originally attended to them, (a) and cross-questioning is not so likely to confuse that order. With a story learnt off by heart it may easily happen that the same question put in different forms and in different contexts will not receive the same answer, for it is not based on any firm association of ideas, as in the case of ordinary memory. Real events are also better recollected because we localise them in time and space and so give them Definiteness, assigning them a particular place in our past experience. It would seem that conditions favourable to memory such as interest, attention, impressiveness of the original experience, its intensity and distinctness, duration in the happening, &c., are less likely to be present in the mere learning of a tale than in the occurrence of facts, and hence retention and revival will become more difficult.

The statement then that a 'person may equally persistently adhere to falsehood once uttered, if there be a motive for it. if by 'equally' is meant 'equally successfully', is open to criticism on the basis of memory. It has always seemed to us that for this reason a statement does gain value by repetition. if the second statement is substantially in accord with the original, and especially if it has stood the test of cross-examination. For a good cross-examination will by suggesting other mental associations be likely to break down the association of ideas in the mind of the witness unless that association has some basis in reality; if it fails to do that, there is reason to think the story has a foundation of fact. To apply this view to what has become an axiom with the lawyers, *viz.*, that 'the statement of an accomplice does not at all improve in value by repetition'

(a) See Chapter IV, para. 8.

(p. 997) we are inclined to dispute this if any attention is to be paid—as we think it should be—to consistency.

As there seems to be some confusion in the reasoning here we desire to quote more at length. It is said (p. 925): “ Previous statements made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient corroboration. His statement whether made at the trial or before the trial, and in whatever shape it comes before the Court is still only the statement of an accomplice, and does not at all improve in value by repetition. ”

Now whether the previous statement of the accomplice is a *sufficient* corroboration of his evidence at the trial or not, is a question of fact to be decided in each case, and we have little doubt that in some cases it may be so: but however this may be, it is a different matter from the question whether the statement gains *at all* in value from repetition. It gains to just the same extent as that of the evidence of a non-accomplice witness gains, neither more nor less, because consistency is the test here and not the moral character of the witness: and to say that it does not improve in value because it ‘ is still only the statement of an accomplice ’ is simply to fail to grasp the principle on which the idea of corroboration in s. 157 of the Act is founded. It is just one of those silly dicta that will not bear examination, but because it has never been examined but has been repeated with parrot-like fidelity by legal writers it has come to be regarded as an axiom instead of being rejected as fallacious.

“ It is further to be observed that the committing of a statement to writing calls forth unavoidably a greater degree of attention than the exhibition of it *viva voce* in the way of ordinary conversation. If this be done honestly at the time of the occurrence, which forms the subject of the statement or so soon afterwards that the incidents must have been fresh in the writer’s memory, the writing is a most reliable means of preserving the truth, more reliable indeed than simple memory itself.”

This is somewhat loosely expressed : if it is intended to say that the writing calls forth a greater degree of attention to the occurrence itself, the statement is in the nature of a *hysteron proteron*. For the writing does not in any way cause the attention which must be prior to it, but it is the attention given which aids retention and so facilitates the subsequent commitment to writing, the writing being merely the mode of expressing the conscious thought. If, however, all that is meant is that the committing to writing calls forth greater attention *to the writing* than the speaking of the occurrence does to the speaking, this may or may not be so, we should say, according to the circumstances, but we do not quite understand either the value or the application of such a statement here. If we may conjecture, perhaps the passage was intended to assert that writing causes reflection on the occurrence, and this reflection, while the occurrence is recent, impresses it on the memory better than the mere act of speaking of it. This is doubtless true: when we so to speak objectify anything it involves care and attention to the process, *i.e.*, here the cerebral activity: but after all the passage amounts to little more than saying that memory aided by something else is more reliable than memory aided by nothing else, a somewhat self-evident proposition.

“ Here the writing is in the stricter sense used to *refresh* the memory, that is, the witness *has a present memory of the facts* after the inspection of the writing. In this case the document is resorted to *to revive a faded memory* and the witness swears from the actual recollection of the facts which the document evokes. *Memory* is in other words *restored*. ”

The italics are those of the commentators : to speak of ‘reviving a faded memory,’ and ‘restoring memory,’ is open to the objection that memory is always a construction from the present,^(a) and it is therefore better to speak of a past

(a) Chapter IV, para. 7.

recollection. What is really revived or restored is the mental image and it is because of the power of words to do this that documents are used for this purpose.

The next case, *viz.*, where the witness merely recollects having seen the writing before, and remembers that at the time he saw it, he knew the contents to be correct, seems to clearly involve inference.

The third case is “where it brings to the mind of the witness *neither* any recollection of the *facts* mentioned in it, *nor* any recollection of the *writing* itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing which he knows to be genuine” see also s. 160 of the Act.

It is explained that the witness here swears ‘from a conviction arising from the knowledge of his own habits and conduct sufficiently strong to make the existence of the document wholly irreconcilable with the non-existence of the fact, and so to convince him of the affirmative;’ and again (p. 1002, note 3), ‘the witness is allowed to testify to the matter so recorded because he knows he could not have made the entry unless the fact had been true.’

It is evident from these explanations that the witness is here allowed to give evidence from inference: he infers from his implicit knowledge of his self that something which he has done expresses what is true. He is even allowed to swear that a writing which he did not make himself, but which some one else made and which he read at the time and knew then to be correct must necessarily be true (see s. 159, para. 2, read with s. 160), which is likewise an inference.

Our object in noticing these passages is merely to illustrate the way in which evidence on inference is allowed in some cases, because it seems to us that when it is thus admitted it is hardly worth while to invent reasons and strain interpretations elsewhere of which examples have been given, in order to argue that what are really inferences can be otherwise explained.

CHAPTER XV.

RESPONSIBILITY—PUNISHMENT—JUSTICE.

Responsibility—Legal and moral responsibility not identical—Necessity of considering moral responsibility—In what it consists—Compulsion—Legal responsibility in cases of intoxication—The test of it in cases of alleged insanity—Moral insanity—Hereditary nature of vicious tendencies.

Punishment—Its objects—The retributive, reformatory and deterrent character of punishment—To what extent the legal view of punishment is founded on each—The preventive sections of the Criminal Procedure Code a measure for the protection of society and nothing else and cannot be justified—Neither can the severe sentences passed for cattle and boat stealing and for offences against the Opium and Excise laws—Inhuman sentences on so-called hardened criminals similarly cannot be defended—The right of society to protect itself at any cost to the individual exaggerated—Punishment must be founded on the notions of Responsibility and Justice, and must not be inflicted contrary to the sentiment of the people.

THE subject of Responsibility is referred to in the Chapters on Intention, Insanity and Hypnotism, here
Legal and Moral Responsibility. it is proposed to give a more general account of it.

Legal and moral responsibility, we are aware, do not always coincide. The legal presumption is that no one can plead ignorance of the law, while it is of the essence of moral responsibility that there shall be knowledge of right and wrong : none the less we cannot on this account avoid some discussion of moral responsibility. For whenever it has to be decided whether a man was of sound mind, or when a special intention is required on the part of the doer in order to constitute some particular offence, there the question of knowledge cannot be excluded.

This seems to be admitted by the legal writers themselves, and such of them as hold the theory—which we have had occasion to criticise elsewhere—that the question of intention is the

question of knowledge, will, if they are logical, have to admit that they must consider this point in almost every criminal case : and further, even those who would deny the necessity of proving knowledge in order to impute guilt will allow that the degree of knowledge must make some difference to the degree of guilt imputed.

The popular view of responsibility, which is akin to the moral one, is that a man is only responsible for that which he wills, and that only is regarded as a real volition which appears to be an expression of the man's self. It has, however, to be remembered that the man's self is his permanent disposition which has been formed as the result of his past thoughts and acts, and so, if analysis be carried further, the question becomes to what extent a man has made this standing will.

“ The question is,” says Mr. Bradley, “ can the man say ‘ It is not my doing that my will for good is not stronger. It is not my doing that solicitation to bad is not weaker ? ’ Can he say ‘ What energy was in me has, so far as my power went, been made one with good and withdrawn from bad. My standing will, for which volition was not possible, was in this respect not of my own making ? ’ If a man can truly say this, then he may also say ‘ I did not have a volition because I could not ; and therefore I am not responsible for the act, because not responsible for the will.’ No man can be tempted except by his own will ; and the point is, is it his fault that his will is not otherwise ? If that is not his fault, then we admit that he was overborne, that volition was really impossible ; and we think that to him as a moral agent, the deed is not imputable.” And again, “ But where we collect ourselves and volition does take place, I think we must say that, given knowledge, there is always imputation.” (a)

(a) F. H. Bradley, *Ethical Studies*, p. 43.

For responsibility then you must be able to say that the doer has had both the knowledge of how to act and the power to act in one of two ways, or either to act or abstain from acting : and as regards this power, the writer quoted above, distinguishes absolute from relative compulsion. Absolute compulsion is the production in a man of a state of mind or body without his actual will and against his actual or presumable will : relative compulsion is when I cause another to believe that in the case of a certain event taking (or not taking) place, a certain state against his will, will be produced in him through my agency. It is a threat of absolute compulsion, and does not relieve from responsibility : it is a ' must ' only in case I make up my mind to have this, or decide that I cannot face that.(a)

The important matter of the necessity of self-consciousness in volition has been discussed in the chapter on Intention, and we shall therefore merely repeat the conclusion here that all morality is not necessarily self-conscious. After we have formed our standing will, we are answerable for acts of will not self-conscious, because we now know their character and ought to have them under control. In many moral actions we act from habit and without reflection, but the formation of these habits has been by acts of conscious volition, and these habits themselves constitute, at all events in great part, our standing will. Our character formed by habit is the present state of our will, and though we may not be fully aware of its nature, yet morally "it makes us what we are.(b)

Degrees of Responsibility.—The popular view of responsibility however, does not sufficiently regard the fact that degrees of responsibility exist. "Human responsibility," says the same writer, "is not a thing which is simple and absolute. It is not a question

(a) F. H. Bradley, *Ethical Studies*, pp. 44-5.

(b) *Ibid.*, pp. 218-19.

which you can bring bodily under one head and decide unconditionally by some plain issue between Yes and No. It is, on the contrary, if taken as a whole, an affair of less and more, and it is in the main a matter of degree. And not being simple, it cannot be dealt with by any one simple criterion, but must be estimated, as we have seen, by several principles of value. It is indefensible to insist that I am absolutely accountable for all that has issued from my will, and am accountable for nothing else whatever.” (a) He then points out that the law must necessarily fail here : it must regard a man as mad or not mad, even though it is well known that moral responsibility exists among the insane in varying degrees. It must make a clean division for legal purposes and apply its hard distinctions in individual cases by ignoring what refuses to square with them. This, of course, must inevitably cause some injustice, and it is therefore the more necessary to consider whether the principles which the law applies are really the best that could be adopted, or whether they might not with advantage be modified at all events in some respects.

2. We shall now consider the legal view of responsibility taken in cases of intoxication. Section 86 of the

Legal responsibility in cases of intoxication.

Indian Penal Code enacts that “In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.”

It should be noted that this section impliedly fastens on knowledge as a condition requisite for responsibility : the fact that special legislation is needed to impute knowledge to the doer practically concedes two things, *viz.*, that knowledge is necessary for responsibility, and that in intoxication a man has not the requisite knowledge. In the first respect it is at one with the moral

(a) Bradley on Mental Conflict and Imputation, Mind N. S. 43, pp. 312-13.

view, in the second it runs counter at all events to the popular view of moral responsibility by attributing knowledge where it does not exist. The popular view, we imagine, would be to blame the man for intoxication, but not to hold him responsible to the extent of the acts he did while in that state. Now we have observed that whenever the legal view is not in harmony with popular sentiment, some judges frequently attempt to avoid the real consequences of the legal doctrine, either by fine discriminations by which it can be held that individual instances do not come under the general rule, or by mitigating the penalties without any adequate logical reason. Such an instance was pointed out in murder cases in the Chapter on Intention and again in cases of Kleptomania, etc., in the Chapter on Insanity, and the present subject affords another example.

The popular view is against condemning a man to death who has caused the death of another by an act done while in a state of intoxication, because it does not credit him with the intention of killing but rather considers that he does not properly know what he is about, and so is not fully responsible for his act. It is, we believe, as a concession to this feeling that English judges and writers on English law hold a view that appears to be opposed to the meaning of the Indian Criminal Code, of which some illustrations will now be given.

Speaking of intention in drunkenness, it is said :—" When the crime alleged is such that the intention of the accused is one of its constituent elements, the jury may look at the fact that he was in drink in considering whether he formed the intent necessary to constitute the crime (*R. v. Doherty*, 16 Cox, 306 ; Stephen, J.) : "(a) and again " upon an indictment for murder the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated (*R. v. Grindley*, 1 Russ. 8 ; *R. v. Thomas*, 7 C. & P., 817 : *R. v. Meakin*, 2 D. 297)." (b)

(a) Archbold's Pleading and Ev. in
Crim. Cases, 21st Edn., p. 21.

(b) *Ibid.*, p. 21.

“If the existence of a specific intention,” says Sir J. Stephen, “is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such a crime should be taken into account by the jury in deciding whether he had that intention.”(a)

The passages quoted seem equivalent to saying that the fact that the man was intoxicated alters his intention in the eye of the law, which is just exactly what the Indian Law does not permit to be pleaded ; and they certainly are not in accord with the interpretation of intention according to which every man is presumed to know the natural results of his act, and, if to know them, therefore also to intend them. Although in India the judges do not venture to rule that intoxication can alter the intention, they nevertheless so far give way to the popular prejudice in the matter as to refrain sometimes from passing a capital sentence when the murder was committed by an intoxicated man,(b) or they will take the fact into consideration as affecting the state of the accused’s mind with respect to the question of provocation.(c) It is not apparent why the law should be stricter in India than in England on the point, and it would certainly both be more in harmony with popular sentiment and also correspond more closely with the psychological facts if the English view were adopted : we must, therefore, submit that there is room for modification here in the view adopted in the Indian Criminal Law.

In civil law intoxication is considered under the head of sound mind, and for the purpose of making a contract a person is said to be of sound mind if he is capable of understanding the contract and of forming a rational judgment as to its effects upon his interests ; and a man who is so drunk that he cannot do this cannot contract while such drunkenness lasts.(d) This is really

(a) Stephen, *Digest of the Criminal Law*, 3rd Edn., Art. 29.

(b) See e.g., *Nga Thet Hnin v. Q.-E.* Printed Judgments, Lower Burma, p. 550.

(c) *Nga San v. K.-E.*, Lower Burma Rulings, Vol II, p. 204.

(d) Indian Contract Act, s. 12, illustration (b).

a form of defining his responsibility and it goes further than requiring mere knowledge, at least if part of the section is not to be regarded as entirely otiose, though we must confess that the additional words do not appear to us to mean very much that is not included in a proper acceptation of the word 'understand.'

3. In alleged cases of Insanity, the test made is whether the person can distinguish right from wrong, and again it is suggested "whether he hath as great understanding as ordinarily a child of fourteen years hath;" (1 Hale, 30, 412).^(a) So also in *R. v. Offord*, 5 C. & P., 168, it is said: "It seems clear, however, that to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature."^(b) the concluding words suggest that when right and wrong are spoken of, what is morally right and wrong is intended and not merely what is legally right and wrong. That this is so is further distinctly stated in another passage:—"If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil, then he will be responsible for his actions (1 Russ. 13: *R. v. McNaughten*, 10 Cl. and Fin. 200; 1 C. & K. 130n.; *R. v. Higginson*, 1 C. & K. 129)."^(c)

Sir James Stephen's exposition of the English law on Insanity may be quoted at length as it illustrates the uncertain state of it. "No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind.—

(a) from knowing the nature and quality of his act: or

(b) from knowing that the act is wrong; (or,

(a) Archbold, *op. cit.*, p. 22.

(c) *Ibid.*

(b) *Ibid.*

(c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default).

But an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects abovementioned in reference to that act.”(a) It is explained that the parts in brackets are doubtful law, and that the word “wrong” in (b) is variously interpreted as meaning :—1. Morally wrong. 2. Illegal. This is equivalent to admitting that on just the two points that are difficult to determine the law is uncertain and unable to give a decision that is free from doubt.

Elsewhere when discussing Insanity the same author combats the theory that the knowledge required to constitute malice is not a knowledge that a given act is wrong, but a knowledge that it is illegal, and observes :—“If this were true it would set the law in opposition to those moral sentiments on which it ought to be founded, for the sake of obtaining a degree of precision not really greater than that which it possesses at present.”(b)

In view of this and the preceding quotations it may be said with respect to knowledge that what the law requires for responsibility is the presence in the man of the knowledge of what is morally right and wrong : but there remains the other qualification mentioned above, *viz.*, the power to act or abstain from acting, and it is with regard to this that the hardest questions arise and the legal view appears especially unsatisfactory. In one passage cited above it is said : “If there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime,” and again we find “where the intellectual faculties are sound mere moral insanity—where a person knows perfectly well what he is doing, and that he is doing wrong, but has no control over himself and acts under an uncontrollable

(a) Stephen *op. cit.*, Art. 27.

Criminal Law of England, p. 93.

(b) Stephen, A general view of the

impulse—does not render him irresponsible. (*R. v. Burton*, 3 F. & F. 772).”(a)

The assumption underlying such utterances is that intellect can restrain the passions, whereas we believe the fact to be that there are cases—and many cases—in which it cannot do so. We have quoted in the Chapter on Intention many passages from psychological writers to the effect that it is feeling and desire which govern actions and not thought or the intellect, and that the purely intellectual element is in itself powerless to determine our acts. If the appetites are sufficiently strong on the other side it is idle to speak of reason restraining them, and it is just these cases which are the ones classed as instances of moral insanity, and the true nature of which is really described in the phrase “uncontrollable impulse” used above: if they are uncontrollable, it is clear that you cannot expect reason to control them.

The subject is sufficiently important to quote here more at length the passage from which an extract was given in the Chapter on Intention. “Each of the forms of volitional control just illustrated,” says Professor Sully, “has its limits. Thus there is a state of lethargy or depression of active energy, out of which even the most powerful motive may fail to rouse the subject. At the other extreme there is a strength of instinctive or ‘organic’ impulse which no ideational motive can overcome. The story of the horrors of shipwrecked mariners, and so forth, illustrates the fact that no moral or other consideration will hold back a man from slaking thirst when the appetite reaches a certain intensity, and the means of appeasing it are brought within tantalising distance of his lips. In like manner the control of feeling has its limitations. There are hurricane blasts of passion, as when Lear first takes in the fact of his daughter’s perfidy, against which the will is for the moment powerless These limitations are not the same in the case of all individuals. The limit to control of appetite in the case

(a) Archbold, *op. cit.*, p. 23.

of the drunkard and of the temperate man is obviously a widely different one. What we call strength or force of will is, indeed, measured by the 'height' or maximum degree of intensity of the force counteracted."(a)

In the case of outbursts of feeling the law so far admits their uncontrollable character that in cases of homicide it provides (s. 300, Indian Penal Code) an exception which reduces the act to culpable homicide when done in a sudden passion in the heat of a quarrel, or again when under grave and sudden provocation the agent has lost his self-control; but in the case of those 'instinctive or organic impulses' which lie deeper down in our nature and are therefore more difficult to restrain no such concession has been made. It is here that we find cases of moral insanity, and to say that reason must control them or fear or regard for society or other such motives, is to fail to realise the strength of the organism and the limits of human power. To legislate as though such cases do not exist from the fear that their recognition will weaken the incentive to self-control, and to require by law the exercise of a control which to some men is an impossibility cannot, it seems to us, be defended, because such a course rests on a false basis. It will be far better to modify the legal view of responsibility so as to admit that they do exist and then to determine how society is justified in dealing with such cases, a subject which will be briefly considered later.(b)

Nor must the consideration of the hereditary nature of vicious tendencies be omitted as affecting the question of responsibility and punishment. We shall be content to quote a single passage from Darwin. "There is not," he says, "the least inherent improbability as it seems to me, in virtuous tendencies being more or less strongly inherited; for, not to mention the

(a) Sully, *Outlines of Psychology*, pp. 436-7.

(b) Mr. J. D. Mayne's view of Insanity has been examined elsewhere.

see p. 300, *et seq.*, and the nature of uncontrollable impulses has been more fully treated in Chapters X and XI.

various dispositions and habits transmitted by many of our domestic animals to their offspring, I have heard of authentic cases in which a desire to steal and a tendency to lie appeared to run in families of the upper ranks ; and as stealing is a rare crime in the wealthy classes, we can hardly account by accidental coincidence for the tendency occurring in two or three members of the same family. If bad tendencies are transmitted, it is probable that good ones are likewise transmitted. That the state of the body by affecting the brain has great influence on the moral tendencies is known to most of those who have suffered from chronic derangements of the digestion or liver. The same fact is likewise shown by the perversion or the destruction of the moral sense being often one of the earliest symptoms of mental derangement ; and insanity is notoriously often inherited. Except through the principle of the transmission of moral tendencies, we cannot understand the differences believed to exist in this respect between the various races of mankind.”(a)

4. The subject of punishment naturally follows that of responsibility and, although it is one on which much has been written, we cannot on that account altogether omit it, though it is not intended to give an exhaustive discussion on it. The view taken of it will naturally vary with what is regarded as its chief object. It may be looked at as retributive, preventive, or as reformatory in character, or as uniting all these objects in one, and this will not exhaust all its sides : but it will make a great difference which aspect of it is most emphasized and whether attention is paid most to the claims of Society or the individual.

The retributive view due probably to religious conceptions is, we believe, that of the plain man, that punishment must follow guilt. “We pay the penalty, because we owe it ; and for no other reason : and if punishment is inflicted for any other

(a) Darwin, Descent of Man, Vol. I, p. 189.

reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, &c." (a) The suppression of wrong is the assertion of right, which is an end in itself: punishment is inflicted for the sake of punishment, and no other end is necessary, all that is required is that it should be deserved.

This is the view which, according to Kant, ought to govern judicial punishment, and as we shall point out later that in some instances, at least, it does not do so, we shall quote at length the passage on the subject in Kant's *Werke* IX, 180, 183 :—(b) "Judicial punishment (*pœna forensis*) is not the same as natural (*pœna naturalis*). By means of this latter, guilt brings a penalty on itself; but the legislature has not to consider it in any way. Judicial punishment can never be inflicted simply and solely as a means to forward a good, other than itself, whether that good be the benefit of the criminal, or of civil society; but it must at all times be inflicted on him, for no other reason than because he has acted criminally. A man can never be treated simply as a means for realizing the views of another man, and so confused with the objects of the Law of Property. Against that his inborn personality defends him: although he can be quite properly condemned to forfeit his civil personality. He must first of all be found to be punishable, before there is even a thought of deriving from the punishment any advantage for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to that man, who crawls through the serpentine turnings of the happiness-doctrine to find out some consideration, which by its promise of advantage, should free the criminal from his penalty, or even from any degree thereof. That is the maxim of the Pharisees, "it is expedient that one man should die for the people, and that the whole nation perish not; but if justice perishes, then it is no more worth while that man should live upon the earth."

There is, however, also another meaning attached by some writers to retributive justice, *viz.*, that it is due to sympathetic

(a) Bradley, *Ethical Studies*, p. 25.
(b) The passage is quoted in *Ethical*

Studies, pp. 26, 27, note 1.

resentment. Thus J. S. Mill, writes : " The desire to punish a person who has done harm to some individual is a spontaneous outgrowth from two sentiments, both in the highest degree natural, and which either are or resemble instincts : the impulse of self-defence and the feeling of sympathy. It is natural to resent and to repel or retaliate, any harm done or attempted against ourselves, or against those with whom we sympathise." (a)

But Mill never held that this is retributive punishment pure and simple ; he distinguishes it as follows :—" If indeed punishment is inflicted for any other reason than in order to operate on the will ; if its purpose be other than that of improving the culprit himself, or securing the just rights of others against unjust violation, then I admit the case is totally altered. If any one thinks that there is justice in the infliction of purposeless suffering ; that there is a natural affinity between the two ideas of guilt and punishment, which makes it intrinsically fitting that wherever there has been guilt, pain should be inflicted by way of retribution ; I acknowledge that I can find no argument to justify punishment inflicted on this principle. As a legitimate satisfaction to feelings of indignation and resentment which are on the whole salutary and worthy of cultivation I can in certain cases admit it ; but here it is still a means to an end. The merely retributive view of punishment derives no justification from the doctrine I support." (b) And again, " There are two ends which, on the necessitarian theory, are sufficient to justify punishment ; the benefit of the offender himself and the protection of others." (c)

Mill, therefore, combined the curative view of punishment with that of the protection of society, *i.e.*, the preventive view, but he repudiated the retributive one. Plato also draws a parallel between the physician and the judge (d) and seems to regard the law as a kind of medicine : but the objection to this is that

(a) J. S. Mill, *Utilitarianism*, p. 76.

(b) Mill's *Hamilton*, p. 597.

(c) *Ibid.*, p. 592.

(d) Plato, *Republic*, Book III.

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punishment hardens as often as it cures, and further, as Mr. Bradley says, if punishment is medicine, then if rewards carried with them the benefits of punishment, I should deserve rewards when and because, I am wicked.(a) It is only another way of combining the reformation principle with that of the promotion of the safety of society, to explain the object of punishment as the desire to extirpate wrong ideals ;(b) it is the practicability of the method that is here in question and to a certain extent its justifiability. The question how far society is justified in punishing men for their opinions depends to a great extent on the view taken of the individual's claims as against the state : and as regards the possibility of influencing a man's beliefs by pains and penalties, Bain answers that "penalties are able to control beliefs, with a slight qualification. They can put a stop to the profession of any opinion ; and in matter of doubtful speculation, they can so dispose the course of education and enquiry, that the mass of mankind shall firmly believe whatever the State dictates." (c)

Next to the retributive view the plain man will defend punishment by its deterrent effects, indeed this is his chief argument for the retention of capital sentences. Hear, therefore, what the most popular of modern philosophers, Herbert Spencer, says on this point : "Nay even a distinct foresight of evil consequences will not restrain when strong passions are at work. How else does it happen that men will get drunk though they *know* drunkenness will entail on them suffering and disgrace, and (as with the poor) even starvation ? How else is it that medical students who *know* the disease brought on by dissolute living better than other young men, are just as reckless, and even more reckless ? How else is it that the London thief who has been at the treadmill a dozen times, will

(a) Bradley, *op. cit.*, p. 28.

(c) Bain, *Mental and Moral Science*,

(b) S. Alexander, *Moral Order and Progress*, 3rd Edn., p. 330

p. 404.

steal again as soon as he is at liberty? If hopes of eternal happiness and terror of eternal damnation fail to make human beings virtuous, it is hardly likely that the commendations and reproofs of the schoolmaster will succeed. There is, in fact, a quite sufficient reason for failure—no less a reason than the impossibility of the task. The expectation that crime may presently be cured whether by State education or the Silent system or the separate system, or any other system, is one of those utopianisms fallen into by people who pride themselves on being practical. Crime is incurable, save by that gradual process of adaptation to the social state which humanity is undergoing. Crime is the continual breaking out of the old unadapted nature—the index of a character unfitted to its conditions; and only as fast as the unfitness diminishes can crime diminish.

. . . It is not by humanly-devised agencies, good as these may be in their way, but it is by the never-ceasing action of circumstances upon men, by the constant pressure of their new conditions upon them, that the required change is mainly effected.” (a)

If it be true that evil consequences do not deter the criminal who has to suffer them, is there any reason to suppose that others who merely see the punishment undergone by their fellows would be thereby deterred?

To the opposite effect Bain says: “Withdraw the power of punishing, and there is left no conceivable instrument of moral education. It is true that a good moral discipline is not wholly made up of punishment; the wise and benevolent parent does something by the methods of allurements and kindness, to form the virtuous dispositions of the child. Still, we may ask, was ever any human being educated to the sense of right and wrong without the dread of pain accompanying forbidden actions? It may be affirmed with safety, that punishment or retribution in some form, is one-half of the motive power to virtue in the

(a) H. Spencer, *Social Statics*, Edn. 1892, pp. 171-2.

very best of human beings, while it is more than three-fourths in the mass of mankind.”(a)

We must not be taken to endorse all or any of the views quoted : our object is rather to show the difference of opinion which exists among those who have studied the objects of punishment and its efficacy to promote such aims, and to apply some of these views in what we have to say concerning the administration of justice under the law.

5. It will next be considered to what extent the legal notion

To what extent the legal view of punishment is founded on each of these three characteristics.

of punishment is founded on each of the above views, and it is not intended by this to assert that these characteristics of punishment are necessarily opposed to one another : it is recognised that they may easily flow into one another, but, in so far as one is emphasized to the exclusion of the others, different results will ensue.

According to Bain “the infliction of punishment by law, although gratifying to the sympathetic resentment of the community, is understood to be designed principally for the prevention of injury. The design of punishing offenders by Law is to secure the public safety. Incidental to this is the gratification of resentment, which, however, is still to be in subjection to the principal end.” This is founded on the statement of the late Sir James Stephen from whom he quotes the following :—
“The benefits which criminal law produces are two-fold. In the first place it prevents crime by terror : in the second place it regulates, sanctions and provides a legitimate sanction for the passion of revenge. I shall not insist on the importance of this second advantage, but shall content myself by referring those who deny that it is one, to the works of the two greatest English moralists, each of whom was the champion of one of the two great schools of thought upon the subject—Butler and Bentham. The criminal law stands to the passion of revenge in much the

(a) Bain, *op. cit.*, p. 405.

same relation as marriage to the sexual appetite (J. F. Stephen's General View of the Criminal Law of England, p. 98).”(a)

“Legal punishment is preventive and nothing more,” says another writer “for, however, much the legislation may have a moral object, the administration of the law cannot concern itself with the inner character of the subjects.”(b)

This view neglects the retributive and reformatory sides of punishment and looks exclusively to the interests of Society: there can be little doubt that it has the chief influence in the administration of the law, and further that there is a tendency to unduly emphasize this object. We will proceed to give some examples.

What are known as the preventive or bad livelihood sections of the Criminal Procedure Code are framed in the exclusive interests of society to the complete disregard of its obligations to the individual. Under these sections(c) men are called on to give security for good behaviour, and if they fail to do so, are imprisoned, in most cases with hard labour, not because they have committed any offence but for fear lest they should do so, if they remained at large. It is not pretended, so far as we know, that this punishment has a reformatory effect on them; indeed as it is ‘habitual’ criminals who are chiefly to be treated in this way, it would be somewhat of a farce, if such a contention were made. Nor can it be said to be retributive in character, because they are convicted of no offence before their imprisonment, or, if it is termed retributive, on the ground that it is a punishment for past convictions, then the man is avowedly punished twice for the same offence, which is against the law. It is clearly therefore a measure for the protection of Society and nothing else.

We do not think that it will be denied that many magistrates have an aversion to the employment of these sections, and the

(a) Bain, *pp. cit.*, 267.

(b) S. Alexander, *op. cit.*, p. 330.

(c) Criminal Procedure Code, ss. 109, 110.

pressure to use them comes almost entirely from the side of the Police who regard themselves as responsible for the safety of the persons and property of the people : this reluctance is easily explained in the light of our previous remarks. The popular view of Justice is the retributive one, that punishment is given only because it is deserved and that it is an end in itself : hence as these men have committed no definite crime, they do not appear to deserve punishment, and the ordinary man will not admit that the interest of Society is in itself a sufficient reason.

And the popular instinct in the matter is a sound one : for not only is this procedure contrary to what appears to be natural justice, but, if once the right of Society be admitted to imprison men who have committed no crime, as a protective measure, there is no guarantee where this course will stop. Such license must inevitably re-act detrimentally on Society itself, and what is done with hesitation by one generation will be decreed without compunction by the next. Kant's protest must always remain true "a man can never be treated simply as a means for realizing the views of another man, and so confused with the objects of the law of property. Against that his inborn personality defends him."

For if Society is justified in regulating the lives of the individuals that compose it so as to promote the well-being of all, it must be remembered that it has an obligation to the individual to allow him the opportunity to develop the capacities that are in him : this is the lesson which is taught us by the writings of the late T. H. Green, and this aspect of the question cannot be overlooked. How does Society fulfil its task ?

It has always struck us that there is a certain irony in imprisoning men merely on the ground that they have 'no ostensible means of subsistence' for these are one class to whom the preventive sections apply. Is it no fault of the Society in which they live that they are without these means ? Have the measures of Society to introduce cheap labour into the land done nothing to depress the rate of wages and render the struggle for existence harder ? Even its benevolent efforts to ward off death from famine and plague

serve but to increase competition in the highly populated districts and to make greater demands on the food supply of the country. Does not Society create opportunities for crime by some of its property laws which otherwise would not exist, and can it be said that it has never legislated for the interests of one class to the detriment of another? Or that the education which it provides, or has failed to provide, has not been responsible for some ruined lives? Buckle from the remarkable regularity in the statistics of murder, suicide and marriage drew the following conclusion:—"We have here parallel chains of evidence formed with extreme care, under the most different circumstances, and all pointing in the same direction; all of them forcing us to the conclusion that the offences of men are the result not so much of the vices of the individual as of the state of Society into which that individual is thrown."(a) Professor Alexander also suggests a similar view in the following words:—"The real significance of the doubts which are so strongly felt at the present day as to the lawfulness of punishment lies not in the fact of responsibility itself, but in the distribution of responsibility. It concerns a practical not a theoretical question. A man brought up in criminal surroundings takes to burglary as a duck takes to the water: he is responsible for his thefts, but the responsibility is divided between himself and those who failed to give him ideas of right and wrong. Practically, it becomes the duty of Society to see that the temptations to vice are removed from its members as far as possible. And in proportion as it has neglected this duty will be the vividness of the feeling that a particular criminal is suffering for the sins of others as well as his own."(b) We have not space to attempt to argue this matter in full: we wish simply to suggest doubts in the minds of those who think that Society should regulate matters how it will and that the individual must give way, whether this is always just to the latter.

(a) T. H. Buckle, *History of Civilization*, General Introduction, p. 29.

(b) S. Alexander, *op. cit.*, p. 342.

6. It seems now the season to protest against the neglect of what is due to the prisoner guilty though he may be to some extent. It has become a settled principle that certain offences shall be punished in India with exceptional severity because it is for the interest of Society that they shall be put down: we allude to cases of cattle-theft, boat stealing and some offences against the Opium and Excise laws. We do not know on what principle it can be said that it is a greater crime to steal two bullocks valued at Rs. 120 than it is to steal clothes worth that amount or to take the money itself out of a till: yet the punishment in one case will be two years' imprisonment without fail, and in the other probably it will not exceed one year or may be even less, while if that amount be misappropriated the penalty in most cases would not exceed six months, even though a breach of trust be committed.

But when once we introduce the principle of the protection of Society anything appears to be justified: because men allow their cattle to wander about without supervision, opportunities to steal them frequently occur, and therefore in order to make up for Society's neglect in this respect, the punishment for the crime must be made so severe as to deter criminals from attempting it. That is to say Society itself provides special opportunities for the crime and thereby tempts the man to become a thief, and then claims that the culprit shall not merely be punished for his crime but also for the fact that it was made easy for him.

The only other defence that we have seen of these sentences is that the cattle are the cultivator's means of livelihood and the boat the villager's necessary means of subsistence, but is this not equally true of the stock-in-trade of the clothes dealer or the coin of the money-lender or indeed of any form of wealth in the hands of its user? It may be that it is a greater crime to rob a poor man than a rich, but we do not remember to have seen the argument put in this form with reference to cattle and boat stealing, nor would it always be applicable for the owners of cattle are often

wealthy men. Nor indeed is it easy to see how the law could be administered on so avowed a principle of class distinctions.

The severity of sentences for the illicit sale of opium and liquor is open to a more sordid interpretation, and at the same time to a more charitable one. If it be correct that Society

*In Opium and
Excise Cases.*

looks with much disfavour upon these crimes because the illicit vendors by competing with the licensees injure their monopoly and lower the value of their licenses and hence lessen the amount of revenue which they will pay for them to the State, it is no longer the protection of Society which governs the case but rather its money-making power. But if these heavy penalties are not a tribute to Mammon, and are rather aimed at checking the spread of opium and liquor consumption, because Society considers it harmful to its members, we have the spectacle of a house divided against itself. Opinion is divided as to the noxious character of the drug; the spread of such consumption in itself shows that Society is fighting against its own members, and apart from the question of the efficacy of such measures to attain their object and of the obligations to the criminal in the case, there arises here the further consideration of the extent to which a majority may rightly coerce the minority and under what circumstances, which is too long a matter to enter into now.

To inflict punishment on the offender in order to reform him is a view of the object of punishment to which we have already referred, but to inflict punishment on him in order that others may be not merely saved but reformed seems to go beyond the Pharisaic maxim, it is expedient that one man should die for the nation.

But we must further protest against the inhuman sentences which are habitually passed for trivial thefts on the ground that the offender has been four or five times convicted before and so has become a terror to Society. It is no infrequent thing to

Long terms of imprisonment passed on habitual criminals for trivial offences.

see terms of ten years' imprisonment given and sentences of transportation for life in such cases. We are aware of the arguments

by which they are justified, that such men merely prey on Society and have had their chance given them and shown themselves hopeless of reform : but we must repeat, is Society entirely blameless in this matter ? Is Society's interest the one consideration in the case, and, even if it were so, is it necessary to imprison such men for life ? We submit that this is regarding punishment too exclusively from the side of the protection of Society, and that this is not the view which the law should adopt.

“ To ensure obedience to law,” says Bain, “ there must be some pain inflicted on the disobedient, sufficient, and no more than sufficient, to deter from disobedience.”^(a) But it will be said, no amount of punishment will make these men law-abiding : if so, you admit that punishment will not accomplish the object you aim at, and so your case for punishment fails and Herbert Spencer is right that crime is incurable by such means.

All that your contention warrants is to detain these men in some place where they cannot injure Society, an Asylum, a home or the like, but it does not justify the use of penal measures : this has been recognised by those who not long since started the movement in England for life-long confinement of habitual criminals, not in jails but in homes. The majority, however, who approve long sentences on hardened criminals do not dissociate the penal view from that which looks purely to the protection of Society, because they have doubts as to the right of Society to detain men for life on such grounds only. It is patent to them, as indeed it should be to all, that, to employ Kant's words, this is ‘ using a man simply as a means of realising the views of another man : ’ their natural sense of justice compels them to maintain that the detention is at least in part because the man by his crime has deserved punishment. But how little desert really enters into the case is plain from the magnitude of the sentence when weighed against the triviality of the offence.

(a) Bain, *Mental and Moral Science*, p. 404.

7. At some time or other the question must be faced, how

The right of Society to defend itself at any cost to the individual exaggerated.

far shall the interests of Society be allowed to encroach on the bounds of justice? It is not only the criminal and the lunatic whom Society seeks to detain, but it will shortly be also moral insanes and hypnotic patients who have been made instruments of crime, for this is the recommendation of the authors of *Animal Magnetism*.(a) Nor is it likely that we shall stop here. We are drifting in the direction where Society is to be protected at any cost and the individual counts for nothing—nay, even the individual's crimes are to be excused if it can be shown that it will be better for Society that he should go free than pay the due penalty of his guilt. For this is the explanation of the decisions in perjury cases that if a witness states what is false on oath and before he has closed his deposition states what is true, he is not to be held guilty of perjury.(b) It is argued that it is for the interest of Society that he should speak the truth, though it be at the last, rather than that he should not speak it at all: if, therefore, the fact that he contradicts his first statement, renders his conviction for perjury certain, he will have a direct motive to stick to the falsehood and the truth will never come out of him.

We do not deny the force of this argument: for the interests of Society it doubtless appears better that he should under such circumstances go free, but nevertheless we say with Kant, “but if justice perishes then it is no more worth while that man should live upon the earth.” The people that for the supposed promotion of its interests fails to exact the penalty of guilt, itself participates in a public violation of justice: as soon as it begins to identify justice with expediency, it adopts the purely utilitarian standard of right with all its demoralizing consequences.

(a) Binet and Féré, *Animal Magnetism*, p. 373.

(b) See *Q.-E. v. Nga Tha Dwe*, Printed Judgments, Lower Burma, p. 21; and *Reg. v. Balkrishna*, there

quoted, and especially the remarks in *Murrena Madoo v. Q.-E.*, *ibid.*, p. 247; *Q.-E. v. Nga Po Nyun*, p. 79; and *Mi Me Ma v. Q.-E.*, p. 91.

One of our main objections to making the interests of Society the measure of punishment, is that we thereby tacitly make the effects of an act the criterion of guilt and not the motive with which it is done. This is opposed to the teaching of morality, which, except in the case of the Utilitarians, whatever it may say of the effects never fails also to look to the intention of the doer : it is opposed also to the fundamental idea of responsibility which has already been stated to be that a man is responsible for that which he wills.

Punishment cannot be separated from Responsibility and the idea of Justice, and into neither of these does the notion of the interest of Society enter. "In the feeling of responsibility" says Höffding, "and in repentance is implied no more than that the individual recognises that he has willed the action, and by virtue of the better mind to which he has come condemns himself for having done so :"(a) and concerning justice Professor Sully writes :—"Thus the sentiment of justice embodies in a higher representative form, and takes up into itself something of the flavour of the earlier and simpler passion of anger or resentment."(b) And again, "thus the peculiar feeling of condemnation of a wrong action can be traced down to the instinctive re-action of a purely individual or egoistic resentment."(c)

The desire to promote the interests of Society is a notion alien to justice : it may be that sympathy enters into some men's idea of justice, but this is an entirely different feeling from that which inspires the deterrent view of punishment. It is a mere extension of the feeling of resentment to cases in which others are affected, and is in no way based on utility. This is clear from the writings of even such a Utilitarian as Mill, as *e.g.*, in the following passage :—"The sentiment of Justice in that one of its elements which consists of the desire to punish is the natural

(a) Höffding, *Outlines of Psychology*, p. 348.

p. 352.

(c) *Ibid.*, p. 369.

(b) Sully, *Outlines of Psychology*,

feeling of retaliation or vengeance rendered by intellect and sympathy applicable to those injuries, that is, to those hurts, which wound us through or in common with, Society at large.”(a) Those authors who mention the protection of Society in this connection regard it as an incidental consequence of the measures taken for other objects, but not in any way as the motive which inspired them. So Buckle writes: “To sympathy again we must ascribe the establishment of rewards and punishments and the whole of our criminal laws, none of which would have existed but for our disposition to sympathise with those who either do good or suffer harm: for the circumstance of Society being protected by penal laws is a subsequent and subordinate discovery, which confirms our sense of their propriety but does not suggest it.”(b) Similarly, the utmost which Adam Smith will concede to the notion of social convenience is that we frequently have occasion to confirm our natural sense of the propriety and fitness of punishment by reflecting how necessary it is for preserving the order of Society.(c)

8. It probably will not be disputed that if confidence is to be retained in any system of administration of the penal law that system must be founded on justice and it must not conflict with the sentiment of the people. “The administration of criminal Justice,” says Sir James Stephen, “is based upon morality. It is rendered possible by its general correspondence with the moral sentiments of the nation in which it exists, and if it habitually violated those sentiments in any considerable degree it would not be endured.”(d)

It has been said that what is involved in the popular view of justice is that a man shall answer for guilt by punishment and to the extent only to which he has deserved it: if punishment is

(a) J. S. Mill, *Utilitarianism*, p. 77.

(b) T. H. Buckle, *History of Civilization*, Vol. I, p. 311.

(c) Adam Smith, *Theory of Moral*

Sentiments. Vol. I, pp. 89, 92, 115-6.

(d) Stephen, *A general view of the Criminal Law of England*, p. 82.

used for any other end it is diverted from its legitimate use. It is not the plain man but the rulers and guardians of the people who desire to make of punishment an instrument for protecting Society at large: this, it seems to us, is shown by the conduct of the people themselves. For, except under the spur of a religious passion or some unusual emotion of terror or wrath, they are never desirous of increasing pains and penalties, but rather of mitigating sentences. It is always the man in the street who gets up the petition to reprieve the condemned murderer, although if the deterrent view of justice were the one that prevailed, it would be clearly for the protection of Society that he should undergo the extreme penalty of the law. The heaviest sentences rarely meet with widespread approval and any public mark of disapprobation of an exercise of clemency by the crown is unknown: the judge who seeks the reputation of a strong man by the severity of the punishments he imposes is merely regarded as an inhuman monster, for the mass of mankind are guided chiefly by their feelings, and there is no surer way to raise sympathy for a criminal than to punish him beyond the normal measure.

Such outbursts as those which have occurred in some American States where white lynchers have burnt and tortured Negroes who have committed the offence of rape on white women, do not in reality show the contrary. ^{the result} These acts are done under the influence of a special emotion of mingled anger and fear which is aggravated by a race-feeling of probably unparalleled strength in any other part of the world; and though we must confess that the tortures inflicted on the victims are partly for the sake of the deterrent effect, they are partly also due to the feeling that so enormous a crime does not receive its proper penalty except by the infliction of an unusually severe punishment. "In Lynch law," says Professor Alexander, "we have a summary act, which *though springing from the sentiment of vindictiveness*, is the act of a whole community." (a) There is further the additional reason

(a) S. Alexander, *op. cit.*, p. 328.

that, owing to their want of confidence in the administration of the law, many of these lynchers believe that if the accused were left to stand their trial, they would escape all penalty for their guilt, and this is the motive which leads them in the first place to take the law into their own hands. And in any case these outbursts are now always condemned by the mass of the citizens who are almost as eager that the lynchers shall in their turn receive justice, as the latter were that the original criminals should not avoid the punishment of their crime.

In a country like Burma there seems to be not merely an entire absence among the people of a desire to protect themselves by inflicting judicial punishments, but also a lack of wish that crime shall meet with its due penalty. This is shown by their dislike to capital punishment, which is partly due to the tenets of Buddhism which forbids the taking of life, and partly to the reflection that when one life has been taken it does no good to take another—a reflection which shows how little they value punishment for its deterrent results. Similarly, while it is always difficult to obtain evidence for the prosecution, the Burmans show no reluctance to depose on behalf of the accused, and while only the depraved among them will commit perjury in civil suits or against the accused in criminal cases, even many respectable men think little or nothing of swearing falsely in order to bring about an acquittal. Nor do they condemn strongly the giving of bribes to escape punishment or even the receiving of them by the Magistrates, and as for their jails, if left to native management, they would soon be rather places of rest than of punishment. From all this it would seem that they have no regard to either the retributive or the deterrent nature of punishment, but they appear to have some belief in its reformatory character: for they readily receive among them and employ men who have been in jail and will even put them in positions of considerable trust. They attribute crime to folly rather than vice and look on men as young up till the age of fifty, and this application of the Socratic view that vice is ignorance, will perhaps explain why they have no desire for heavy penalties.

Though they appear to be exceptional in the lenient view taken of wrong doing, there is nothing in their ideas which is in sympathy with the passing of severe sentences for their deterrent effect and for the protection of Society, and we conceive that this policy, which unhappily seems to be so much in the ascendant, is less likely to receive appreciation among them than in any country with which we are acquainted.

CHAPTER XVI.

DIFFERENCES OF RACE.

Reasons for studying differences of Race—Dangers of misinterpreting other minds intensified when there is a racial difference—Difficulties of understanding less civilised peoples—The part of heredity in difference of race—Natural distinctions of temperament—Influence of food and climate—The aspect of nature arouses either the imagination or the reason—Effects of Superstition—Religion and Education—Review of certain characteristics of Eastern nations—Their aversion to change—Their want of veracity explained—Forethought only a duty in industrial civilisations—Love of animals among the Burmese conjoined with disregard of human life—Burman fearlessness of death—Concluding remarks.

PSYCHOLOGY treats chiefly of the common characteristics of mind, and its conclusions therefore, like those of most sciences, must in the main be general; the application of them must be subject to such modifications and allowances as the peculiarities of individuals compel us to make in particular cases. "It is not sufficient," says Ribot, "to describe the manifestations of the mind in general, we must also take into account the individuals in whom they are incarnated and the varieties they reveal to us." (a) We have here and there throughout this volume taken the opportunity as occasion arose to point out some respects in which the Asiatic and the European differ, and the consequent variations which will naturally occur in their points of view, manner of behaviour, &c., under ordinary circumstances; and we shall now develop this subject further both because of its importance from a psychological standpoint and because it may be of some utility in a work which is partly designed for the perusal of Europeans who have to do with Asiatics.

(a) Ribot, *Psychology of the Emotions*, p. 381.

There is a general danger of misinterpreting other minds to which the psychologist is always alive, and this is intensified when we are trying to understand one of another race. Prof. Sully describes it as follows:—"On the other hand there is a characteristic danger in reading the minds of others which arises from an excessive propensity to project our own modes of thinking and feeling into them. This danger increases with the remoteness of the mind we are observing from our own. To apprehend, *e.g.*, the sentiments and convictions of an ancient Roman, of a Hindu or of an uncivilised African, is a very delicate operation. It implies close attention to the differences as well as the similarities of external manifestation, also an effort of imagination by which, though starting from some remembered experiences of our own, we feel our way into a new set of circumstances, new experiences, and a new set of mental habits. Children again, owing to their remoteness from adults, are proverbially liable to be misunderstood."(a)

A similar warning is given by Prof. James:—"The truth is that we are doomed, by the fact that we are practical beings with very limited tastes to attend to, and special ideas to look after, to be absolutely blind and insensible to the inner feelings, and to the whole inner significance of lives that are different from our own. Our opinion of the worth of such lives is absolutely wide of the mark, and unfit to be counted at all."(b)

It may probably be safely asserted that the difficulties of understanding others arise mainly from want of sympathy with them, and it is not possible to have such sympathy without some experience of pleasures and pains similar to theirs, or without the exercise of an imagination which must be based in part on such experience. Only thus can a man know what causes such feelings in them. Now it is specially difficult to

Difficulties of understanding less civilized peoples.

(a) Sully, *Outlines of Psychology*.
p. 6.

(b) W. James, *Human Immortality*.
p. 125.

enter into the feelings of others, when their conditions of life (internal or external) are very different from our own. Difference of language (as between Greeks and Barbarians), of colour (as with Negroes), of rank and of faith have afforded long and stubborn resistance to the growth of sympathy in the human race. (a) Any attempt, however, to grasp the thoughts and feelings of another race must start with an effort to comprehend the powers of that race and the recognition that it is limited by those powers, *i.e.*, by the mental equipment which the race possesses. These powers will depend on inherent differences of race (which will be treated of later), geographical situation, social organization, religion, education, temperament, &c. This truth has been frequently laid down with reference to savages, and though it is not intended to class Indians or Burmans as such, a quotation of some of these remarks will afford an illustration of what is meant. "In considering the state of the savage mind," says Prof. Stout, "the first point to be remembered is that in it complex and comprehensive systems of ideas, which are normally present in civilized races, are simply absent; savages can only apperceive with the systems which they actually possess. Since these are mainly connected with their own actions and with their personal relations the anthropomorphic interpretation of nature follows as a matter of course." (b)

And again, "The root of the matter is that they (*i.e.*, savages) must make themselves at home in the world somehow. They have a multitude of practical and to some extent of theoretical needs, which cry out for satisfaction; and the material for satisfying them is limited. This limitation acts in two ways. In the first place, thought-combinations are possible for them which are impossible for us; because in us they would clash with whole systems of ideas which in the comparatively undeveloped consciousness of the savage have no existence. In the second place,

(a) Höffding, *Outlines of Psychology*, p. 256.

(b) Stout, *Analytical Psychology*, Vol. II, p. 138.

the limitation of their material limits their choice of alternatives. They have to follow out certain lines of mental activity because no others present themselves. Belief is that by which we live, and since the savage must live as he can, so he must believe as he can.”(a)

It follows from this that the highly civilized European must be extremely careful when judging what it is probable a less civilized man of another race said or did; for what is improbable to him, because it conflicts with his knowledge and experience would not be so to a person endowed with less knowledge and different experience, and courses of action, which to the European are manifestly inferior to others, will be those pursued by the more savage race because they will be the only courses to occur to their minds. It is only by comparison with something better that the less advantageous course appears unlikely to have been adopted. An illustration of the way in which the observer must search in his own mental life for analogies by the aid of which he can imagine the mental life of those around has been given in the chapter on Imagination.(b)

2. Among the various causes which contribute to difference of character among races, the somewhat disputed influence of heredity will be first noticed. The subject is too wide to be discussed at length and we shall therefore have to be content with citing the views of a few writers on the subject.

According to Wundt, “The assumption of the inheritance of acquired dispositions or tendencies is inevitable, if there is to be any continuity of evolution at all. We may be in doubt as to the extent of this inheritance; we cannot question the fact itself. But more individual gifts—the transmissibility of certain talents is unquestionable—also appear to lend probability to the view that the propagation of definite dispositions takes place, at least within certain limits it is the

(a) Stout, *Analytical Psychology*.
Vol. II, pp. 258-9.

(b) Chapter IX, para. 5.

disposition, not the actual functional capability which is connate Ideas cannot be inherited any more than complex volitional actions. Talent and instinct alike are latent until external stimulation calls them into actual life.”(a) Prof. Sully thus sums up the contentions of the evolutionists:—“According to Mr. Spencer and other evolutionists, transmission of acquired character is a chief factor in the evolution of the human race, since it secures the slight improvement of each successive generation by the inheritance of the fruit of the exertions of its predecessor. If we adopt this view we may argue that every sound child born in a civilized community brings with it into the world an outfit of instinctive tendencies or dispositions constituting the natural basis of the civilized and moralized man. These tendencies being comparatively late in their acquirement by the race, are necessarily inferior in strength to the deeper seated and earlier acquired impulses of the natural man; yet they form a valuable support to all educational effort.”(b)

It was the view of Buckle and Mill that there are no fundamental natural differences in the various races into which mankind is divided, but differences are produced by physical agencies, *i.e.*, climate, food, soil, the aspect of nature, social and moral influences, &c.(c) Since their time, however, the theory of inheritance of dispositions or tendencies has steadily gained ground and they cannot be neglected: “that great differences arise in spite of similarity of education shows,” says Höfding, “that at any rate a natural basis always plays some part.”(d)

Now in the opinion of Mr. Bradley this natural basis amounts to the inheritance of the basis of a national type of character. “It is, I believe,” he says, “a matter of fact that at birth the child of one race is not the same as the child of another; that in the children of one race there is a certain identity, a developed or

(a) Wundt, *Human and Animal Psychology*, pp. 405-6.

(b) Sully, *op. cit.*, pp. 75, 76.

(c) T. H. Buckle, *History of Civili-*

zation, Chap. II, p. 39, and p. 178.
J. S. Mill, *Principles of Political Economy*, Vol. I, p. 390.

(d) Höfding, *op. cit.*, p. 351.

undeveloped national type, which may be hard to recognise or which at present may even be unrecognisable, but which, nevertheless in, some form will appear. . . . We see the child has been born at a certain time of parents of a certain race, and that means also of a certain degree of culture. It is the opinion of those best qualified to speak on the subject, that civilisation is to some not inconsiderable extent hereditary; that aptitudes are developed and are latent in the child at birth; that it is a very different thing, even apart from education, to be born of civilized and of uncivilized ancestors. These 'civilized tendencies,' if we may use the phrase, are part of the essence of the child; he would only partly (if at all) be himself without them; he owes them to his ancestors and his ancestors owe them to society.''(*a*)

It seems necessary to insist on this power of heredity as it will enable us to realize to some extent the difference which must exist between various races and the way in which such differences are created. But there seems to be further a distinction of temperament among peoples which has always been widely recognised and must clearly have much influence on their thoughts and actions, Darwin describes what we are alluding to in the following terms:—"Their mental characteristics are likewise very distinct; chiefly as it would appear in their emotional, but apparently in their intellectual faculties. Every one who has had the opportunity of comparison must have been struck with the contrast between the taciturn, even morose aborigines of South America and the light-hearted talkative Negroes. There is a nearly similar contrast between the Malays and the Papuans who live under the same physical conditions and are separated from each other only by a narrow space of sea."(*b*)

These last words inevitably recall to mind a somewhat similar difference between natives of India and Burmans, as well as

(*a*) F. H. Bradley, *Ethical Studies*, pp. 153-4.

(*b*) Darwin, *Descent of Man*, Vol. I. p. 260.

between the various races of India who live in close proximity to one another.

Prof. James seems to be describing the same phenomenon in his remarks on the obstructed and explosive will.(a) He there contrasts the type of character in which impulses seem to discharge so promptly into movement that inhibition gets no time to arise, the dare-devil and mercurial temperaments common in the Latin and Celtic races with the cold-blooded and long-headed English character in which inhibition plays so great a part. "It is the absence of scruples, of consequences, of considerations, the extraordinary simplification of each moment's mental outlook, that gives to the explosive individual such motor energy and ease; it need not be the greater intensity of any of his passions, motives or thoughts: as mental evolution goes on, the complexity of human consciousness grows ever greater, and with it the multiplication of the inhibitions to which every impulse is exposed."

Here again one involuntarily likens the explosive type to the Burman character, and if so, it is at once seen how opposite it must be to the English one, a fact which is likely to lead to each misunderstanding the other and the attempt to make the Burman comply with standards which are unsuitable to him. It does not therefore at all seem clear that the English Justice of which we are so proud is necessarily the best kind for the Burman, though it is not surprising to find it assumed so, *e.g.*, in newspapers which are edited by Englishmen.

3. We now pass on to the results of those external influences such as climate, food, soil, social and moral agencies, which some writers consider to be entirely responsible for the differences which they have observed between races. These results have been well traced by Buckle on whose account most of the following remarks are based.(b)

Influence of food
and climate.

(a) W. James, *Principles of Psychology*, Vol. II, pp. 537-9.

(b) See Buckle, *op. cit.*, Chapter II.

Wherever life has been made easy by a favourable climate which renders less food necessary to preserve life and also makes it abundant, as in tropical climates like India, Egypt, Mexico and Peru, population is stimulated and the people are depressed, all power remaining with the upper class; though wealth is accumulated its dispersion is prevented, and so the upper classes get a monopoly of one of the most important elements of social and political power and the great body of the people derive no benefit from the national improvement. This is Buckle's explanation of a phenomenon which exists no doubt in the countries he speaks of, but in Burma where the population has not been stimulated beyond the capacity of the country to support them, the condition of the people is one of content rather than of depression, and though it is true that under the Burmese kings all power was in the hands of the upper classes, the submissiveness of the people was probably due rather to the want of any motive for dissatisfaction with the existing state of things under which they were well-to-do and for the most part let alone. The result may be seen in the presence of a spirit of independence among the Burman labouring classes which is entirely absent in the Indian coolie and a consequent greater intelligence and ability to look after themselves.

Turning to the aspects of nature, these either excite the imagination or arouse the reason: the conditions are such as to do the former in the east and the latter in the west. "Everywhere," says Buckle, "the hand of nature is upon us, and the history of the human mind can only be understood by connecting with it the history and aspects of the material Universe." (a) Now, in the tropics, the external world is more formidable than in Europe, nature is on a more gigantic scale and its aspects more sublime and terrible; it is more dangerous to man because the mountains are greater and form greater barriers; earthquakes, tempests, hurricanes and pestilences are more frequent and their

Aspects of nature
arouse the imagination
or the reason.

(a) See Buckle, *op. cit.*, Chapter II. p. 142.

effects more destructive. It is the imagination which deals with the unknown, and that which is unexplained stimulates it and subdues the reason. Man contrasting himself with the force and majesty of nature around him recognises his own impotence; but where, as in the west, the works of nature are small and feeble, and he can overcome difficulties, he has greater confidence and reliance on his own powers. The phenomena are more accessible, and he can experiment and observe them, and so an analytic spirit is encouraged and reason triumphs.

It is common to hear the Burmans described as an imaginative and lively people, and in the writer's opinion the description is a correct one. We have above one of the causes which has contributed to make them so, while the absence of such conditions in Britain is partly responsible for the lamentable lack of imagination and consequent inability to understand or appreciate anything non-British which characterises the average Englishman and Scotchman. From this the Irishman has been partly saved by his different temperament and the fact that his country is not so severely commercial, and he has in consequence qualities and defects of his own sufficiently akin to those of the Burmese race to earn for the latter the appellation of the Irish of the East.

But the aspect of nature contributes in another way to make a distinction between races: hand in hand with imagination goes superstition, and phenomena, such as earthquakes, volcanic eruptions, pestilences, &c., are wont to be ascribed to supernatural intervention and a strong religious sentiment thereby aroused. Buckle gives as instances in which a danger is not only submitted to but even worshipped the case of the Hindoos in Malabar and the natives of Sumatra, who will not destroy tigers.

In tropical climates health is more precarious and disease more rife than in temperate zones, and so the fear of death more present; hence men are more prone to seek supernatural aid. On the subject of another life reason is silent and imagination

unchallenged, and the most fatal diseases are ascribed to some deities; few who have visited the East have not heard of or experienced, *e.g.*, the tom-toming of the Chinese to keep off the Cholera Devil, and superstition of this kind is strongest where medical knowledge is most backward. In Burma, for instance, where the native doctors are ignorant of even the rudiments of medical science, as recently as about the year 1899, a remarkable example of the grossest superstition was given by the Burman members of the Rangoon Municipality in a discussion on the necessity of taking steps to prevent the introduction of the Bubonic Plague into Rangoon. These members advised that it would be sufficient to read out passages from their sacred books at the corners of the streets to keep off the plague and do nothing else; it is true that in some Christian churches men still offer up prayers for the same object, but how little they rely on such a remedy is shown by their conduct, for it does not lead them to anywise abate sanitary and hygienic measures.

Credulity of course is usually in proportion to want of knowledge, and particularly to ignorance of the explanation of physical agencies. Nature suggests ideas to the Eastern mind which are not rejected because they are not incompatible with the existing knowledge of the people. There is, however, this difference between the Asiatic and the European in this respect; in Europe credulity was at one time unbounded merely because the age was then barbarous, but with advancing civilization it rapidly disappeared; but in the East examples of credulity can be found in Indian literature which was the work of a civilized and lettered people long after the period of barbarism was passed. This may be accounted for by the greater part which the environment causes imagination to play among the Eastern races and also their manner of life. For the whole East is mainly agricultural in its pursuits wherever the climate is tropical, and agriculture is favourable to the growth of superstition, depending, as it does, upon the weather, the laws of which are not as yet understood and which is absolutely beyond the control of mankind. As science

has advanced in the West it has dispelled much of the mystery which surrounds the subject, but inasmuch as the superstition of a people is in proportion to the extent of its physical knowledge, in the East it remains unchecked and inclement weather is attributed to any and every cause. Thus, in Upper Burma in the region which is subject to drought, the natives say that they have had no good rain owing to the coming of the British when they annexed the land.

To find an analogy to the Eastern agriculturists among ourselves, we must look for some profession the main business in whose life is equally dependent on the weather, and we find it in the case of sailors who are notoriously superstitious and credulous because they are similarly exposed to dangers which cannot be foreseen. Or, again, one must go back to the days before astronomy was a science when comets and eclipses were regarded as due to supernatural agency and the signs of coming disaster for no other reason than that the laws which governed them were as yet undiscovered. This, however, is not the frame of mind of the ordinary European who belongs to the manufacturing class and is not subject to such influences; he relies more on himself and his own skill and labour, and therefore it is so difficult for him to understand at all the manner of thought of the man brought up in the midst of such different circumstances. Further, his attention is distracted from those sources which feed the imagination and superstition. For in Europe the population of towns outstrips that of the country, and when men congregate together in great cities their thoughts are concerned with the business of human life and are turned away from the works of nature.

The measure of civilization is the triumph of the mind over external objects, and, says Buckle, "the tendency has been in Europe to subordinate nature to man, out of Europe to subordinate man to nature."^(a)

(a) See Buckle, *op. cit.*, Chapter II, p. 152.

Religion and Education.

The effects of education and religion in producing different types of mind have been so frequently portrayed and the fact is so widely recognised, that it is unnecessary to enter here upon a comparison of Christianity with Hindooism, Mahomedanism or Buddhism. We are tempted, however, to remark that where education has been entirely in the hands of a priesthood it would be contrary to all experience if the result were not to directly produce a superstitious type of intellect. Such are the consequences of the ascendancy of the Brahmins in India, and in Burma much of the Burmese superstition may doubtless be due to the fact that until quite recently the entire education of the people was carried on in the monasteries of the Buddhist monks. A parallel to this state of things may be found in the condition of Scotland in the eighteenth century when the clergy had monopolised all the sources of education both public and private, and hence though the country progressed industrially it remained superstitious and narrow-minded.(a)

4. We have dwelt on a number of considerations which may

Review of certain characteristics of Eastern nations.

appear to some readers to have but a remote connection with differences of race. For ourselves, however, we do not see how it is possible to understand the lives and thoughts of a people unless the conditions under which they live are before the mind, and unless it is also pointed out what are likely to be the influences of such an environment. This has to some extent been done in the preceding section, and it is now proposed to review a few of the mental characteristics which the Eastern races, and particularly the Burmans, are usually considered to possess, and assign, so far as we are able, the reasons for their existence.

Their aversion to change.

The aversion of the East to any change in its institutions has now become a by-word among us: it is exemplified in the caste-system of India, the upholding of custom (ton-san) in Burma,

(a) See Buckle, *op. cit.*, Vol. III, pp. 185, 288.

the unprogressiveness of China, &c., and the only exception to it that we know of is the bastard civilization of the Japanese. The causes are easy enough to trace: the value of custom where might is right and justice is for the strong only, has been repeatedly pointed out,(a) the effect of a ruling priesthood in stereotyping views favourable to it, the absence of a motive for change where the climate is favourable and the nation is not migratory nor forced to come in contact with others in order to satisfy its needs; the tendency of agriculturalists to rest content with a living and the absence of the spur of commerce and foreign trade, these and many other causes doubtless contribute to the result we find. This state of existence is mentioned here rather to point out that the Western love of progress and reform is the exception rather than the rule, and that it is merely the fact that so many Europeans have had no experience except of their own country that leads them to think otherwise.

“The most remarkable fact,” says Sir Henry Maine, “is the relatively small proportion of the human race which will so much as tolerate a proposal or attempt to change its usages, laws and institutions. Vast populations, some of them with a civilization considerable, but peculiar, detest that which in the language of the West would be called reform. The entire Mahomedan world detests it.”(b)

Again the same writer says, “In spite of overwhelming evidence it is most difficult for a citizen of Western Europe to bring thoroughly home to himself the truth that the civilization which surrounds him is a rare exception in the history of the world. The tone of thought common among us, all our hopes, fears and speculations, would be materially affected if we had visibly before us the relation of the progressive races to the totality of human life. It is indisputable that much the greatest part of mankind has never shown a particle of desire that its civil institutions should be

(a) See, *e.g.*, Bagehot, *Physics and Politics*, Edn., 1887, p. 54.

(b) Sir H. S. Maine, *Popular Government* Edn., 1890, p. 132.

improved since the moment when external completeness was first given to them by their embodiment in some permanent record.”(a) He also points out that we do not perceive this because of “our inveterate habit of confining our observation of human nature to a small portion of its phenomena. When we undertake to examine it we are very apt to look exclusively at a part of Western Europe and perhaps of the American Continent. We constantly leave aside India, China and the whole Mahomedan East.”(b)

It is necessary to grasp this fact before attempting either to legislate for or understand the people among whom we come: it is a practice of the advocates which has come under our observation to argue their cases freely on grounds taken from English law, and it is also laid down by more than one legal writer that, in the absence of any definite guidance in the Indian Statute, the English decisions should be followed.(c) Yet it seems to be clear that it is unlikely that ideas which belong to so totally different a form of civilization would be suitable merely because the Statute contains no definite instruction which covers the case, and we, therefore, conceive that the proposition that where the Indian legislature has not provided for the case, English law should be followed, is likely to be a very unsafe one, and the decision in such cases would be far better left to the equitable sense of a judge who understands the people.

A defect of Eastern races which particularly strikes the European mind is their want of veracity. It has always seemed to us that to so great an extent does this prejudice some Europeans against them that it renders them blind to many good qualities which these nations possess, an unfortunate result which has done much to keep the two races apart, for to a mind which

Want of veracity in
Eastern nations.

(a) Ancient Law, Chapter II. pp. 22, 23.

(b) Early History of Institutions. p. 225.

(c) See *e.g.*, Ameer Ali & Woodroffe's 2nd Edn. of the Indian Evidence Act, Introduction. pp. cxxiii-v.

does not value this single virtue at so high a rate such wholesale condemnation naturally appears most unjust.

Yet, as the late Mr. Lecky points out, there is nothing so intrinsically great about veracity, in the sense in which we now employ the term, and it is only the force of circumstances which has led the Englishman to prize it so highly. "That accuracy of statement or fidelity to engagements which is commonly meant when we speak of a truthful man, is usually the special virtue of an industrial nation, for although industrial enterprise affords great temptations to deception, mutual confidence, and therefore strict truthfulness, are in these occupations so transcendently important that they acquire in the minds of men a value they had never before possessed. Veracity becomes the first virtue in the moral type, and no character is regarded with any kind of approbation in which it is wanting. It is made more than any other the test distinguishing a good from a bad man The usual characteristic of nations where the industrial spirit is wanting (*e.g.*, the Italians, Spaniards or Irish) is a certain laxity or instability of character, a proneness to exaggeration, a want of truthfulness in little things, an infidelity to engagements from which an Englishman, educated in the habits of industrial life, readily infers a complete absence of moral principle. But a larger philosophy and a deeper experience dispel his error. He finds that where the industrial spirit has not penetrated, truthfulness rarely occupies in the popular mind the same prominent position in the catalogue of virtues. It is not reckoned among the fundamentals of morality and it is possible and even common to find in these nations—what would be scarcely possible in an industrial society—men who are habitually dishonest and untruthful in small things, and whose lives are nevertheless influenced by a deep religious feeling, and adorned by the consistent practice of some of the most difficult and painful virtues. Trust in Providence, content and resignation in extreme poverty and suffering, the most genuine amiability and the most sincere readiness to assist their brethren, an adherence to their religious opinions which no persecutions and no bribes can

shake, a capacity for heroic, transcendent, and prolonged self-sacrifice, may be found in some nations in men who are habitual liars and habitual cheats.”(a)

We have reproduced this somewhat lengthy quotation because so much of it appears to us to apply to Eastern races, especially to the Burmese people. and because it not only appears to explain the want of veracity among them, but also at the same time to correctly estimate the whole character of such a people.

5. It may similarly be explained why the Burmans, for example, display so little forethought in ordinary life. For it is the industrial habits which bring forethought into prominence and it is only in an industrial civilization that prudence and forethought are regarded as duties.(b) From this spring consequences that are not at first apparent ; when it is deemed a crime to fail to provide for old age, misfortune, &c., there is no inclination in a nation to charity, and those who accept it in any form feel disgraced. But in a country like Burma it is freely given and received, and no stigma attaches to the recipient, and so it is possible for a people to be widely charitable without loss of self-respect on the part of those who are benefited. It is only under such circumstances that, in the words of the poet, ‘it blesseth him that gives and him that takes.’

It may also be noticed here that the doctrine of ‘natural and probable consequences’ which has been discussed before(c) must mean a very different thing to a European trained in habits of prudence and to a man of Eastern race in whose country industrialism has had no influence, and who has neither been taught, nor had occasion, to regard forethought as either a virtue or a duty. Such a doctrine has more justification perhaps among a race, like the English, of the apathetic, as distinguished from the Emotional type, *i.e.*, in which the practical intellect influences

(a) E.H.Lecky, History of European Morals, Vol. I, pp. 137, *et seq.*

(b) *Ibid.*, p. 140

(c) See especially Chapter VII, para. 9.

feelings and movements through ideas. That is the reasonable character where the intellectual tendencies have a real influence : but this is not the Burman's case, and to introduce such a maxim of English law and apply it to a race of an emotional and totally different type is one instance of the great mistake of attempting to apply English legal notions to a race unsuited for them.

It has often been remarked, apparently with surprise, that the Burman love for animals and reluctance to take their life is not accompanied by any similar reverence for the sanctity of human life. Yet it is a mistake to assume that cruelty to animals necessarily indicates a habit of mind which leads to cruelty to men, or that a merciful disposition to animals always implies a gentle and amiable nature. Mr. Lecky quotes numerous instances to the contrary, including Domitian, Spinoza, several of the leaders of the French Revolution, the Turks, the Egyptians, and the Spanish race, and states that this contrast is found more or less in all Eastern nations.(a) The real explanation lies in the fact that the sanctity of human life is a Christian idea based on the fraternity of men in Christ, for nature does not tell man that it is wrong to slay without provocation his fellow men, and even moral societies have existed which have done it without compunction.(b)

Indeed, according to one view, Christianity is itself responsible for the fact that most Europeans display so little regard for the animal world. "One source of countless theoretical errors and practical blemishes, of deplorable crudity and privation, is found," says Haeckel, 'in the false anthropism of Christianity—that is in the unique position which it gives to man, as the image of God, in opposition to all the rest of nature. In this way it has contributed, not only to an extremely injurious isolation from our glorious mother 'nature,' but also to a regrettable contempt of

(a) Lecky, *op. cit.*, Vol. I, pp. 288-90.

(b) *Ibid.*, Vol. II, pp. 17. 18.

all other organisms. Christianity has no place for that well-known love of animals, that sympathy with the nearly related and friendly mammals (dogs, horses, cattle, &c.), which is urged in the ethical teaching of many of the older religions especially Buddhism. Whoever has spent much time in the South of Europe must have often witnessed those frightful sufferings of animals, which fill us friends of animals with the deepest sympathy and indignation, and when one expostulates with these brutal "Christians" on their cruelty, the only answer is, with a laugh: "But the beasts are not Christians." (a)

On the same ground it is intelligible why Burmans do not appear to fear death and a capital sentence has little terror for the condemned criminal who sometimes does not even appeal from the sentence. This has been attributed to a kind of fatalism, but mainly because the true reason has been overlooked. Death actually has little or no terror for the Burmans, because it has never been regarded as a punishment in the same way as by Christians, among whom the Roman Catholic Church in particular taught that it is a penal infliction, and the associations connected with this have continued after men ceased to believe those doctrines. To the Burman death is but the end of one existence and merely the beginning of another, according to the Catholic teaching it was the beginning of endless sufferings and a punishment on account of original sin; when death has been held out as a terror for centuries it has naturally come to be regarded as such, but where the conditions have been different there is no reason why a similar view should have been adopted. (b)

6. In this and the preceding chapter we have confined ourselves less strictly to the purely psychological treatment of what has come under review, but the subjects dealt with have been none the less sufficiently concerned with psychology to warrant their introduction in this

(a) E. Haeckel, *Riddle of the Universe*, Edn., 1903, pp. 125-6.

(b) Lecky, *op. cit.*, Vol. I, pp. 208-12

Volume. An analysis for example of the sentiment of justice can hardly be complete without some reference to moral philosophy, and the same may be said of responsibility.

It is in accordance with our system to refuse to recognise hard and fast lines between different departments of knowledge, and though it is necessary to separate off some sciences for the convenient study of special phenomena, the opportunity of applying the results of such studies *inter se* we hold should always be taken. The failure of the lawyers to appreciate the value of this method is what has contributed so largely to make the law a water-tight compartment cut off from all connection with the streams of knowledge outside it. *finished 11.55 a.m. on 4/10/11*

Oh! You end!

Arnold: amen.

End (thanks goodness)

me too!

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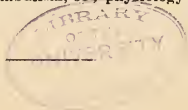
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